Central Law Journal.

ST. LOUIS, MO., FEBRUARY 10, 1899.

Perhaps no subjects of the law present more perplexing problems to practitioners and courts than those growing out of the conflict of the laws of the different States. And this condition is emphasized by the great diversity of the statute laws of the States. If the administration of the law in this country was simply the application of the common law, or even if the statutes, in derogation thereof, were uniform throughout, courts of law would be saved an immense deal of labor and worry of mind. And in no topic of the law is this perplexity more pronounced than that governing the *status* and property rights of married women. In a few of the States substantially the common law prevails, but in such as have undertaken to modify or change it, the enactments on the subject have, in many instances, served only to make the law more obscure, and inasmuch as the statutory laws of the different States, on this subject, are more or less dissimilar, the difficulty in arriving at a correct solution of a problem, wherein is involved the question as to a conflict of laws on the subject of the property rights of married women, will be readily understood. These reflections are suggested by an interesting problem recently presented to Judge Wood of the St. Louis circuit court. In a case before him it appeared that a resident of the State of New York, and having his domicile in that State, was married to a woman residing in the city of St. Louis. A few days after the marriage he returned to the State of New York whence she intended to follow him. Shortly after she died in the city of St. Louis where she had continued to live from the time of her marriage until her death. She left a considerable estate, real and personal, all of which was in the city of St. Louis. She left no will and no surviving descendants. She left two brothers who claimed the estate as distributees under the law of Missouri. The husband took out letters of administration in New York and also in Missouri, claiming the estate under the law of New York. If the estate was to be distributed according to the law of Missouri it would go to her brothers. If it is distributed according to the law of New York the husband was entitled to all of the personal property. By the law of New York the personal estate of a married woman who died leaving no surviving descendants is not distributable under the statute of distributions, but by the rule of the common law. By the common law marriage was an absolute gift to the husband of all the wife's property and of such as came to her during coverture. As to such property the title was vested in the husband; if the wife died first, it was his property after as it was before her death, and as to it no administration was necessary. The husband here claimed that he is the domiciliary administrator of the estate and entitled to it in that capacity, or if the estate is distributed in Missouri he is, as the husband of deceased, under the common law, entitled to the property. A Missouri statute provides that when administration is taken out in that State on the estate of any person who was at the time of his death an inhabitant of any other State or country, and such person dies intestate, his personal estate shall be distributed and disposed of according to the laws of the State of which he was an inhabitant. The husband claimed that upon his marriage his domicile at once became her domicile and so continued, and, therefore, at the time of her death, she was domiciled in New York, and in the eye of the law was an inhabitant of New York, and that under the above provision of the Missouri statutes, being domiciled in New York, her personal estate must be disposed of according to the laws of that State. But the court overruled this contention, and in effect awarded the property to the brothers. The reasoning of the court is interesting and undoubtedly sound. The common law theory of marriage, he argues, has long since ceased to exist everywhere, and especially in Missouri where the law has long recognized the wife as having a separate existence and separate rights and separate interests. By the law of Missouri all the personal property which a wife owned prior to marriage, and all that she may acquire during coverture by gift, descent or otherwise, is and continues to be her separate property. In that State this marital right is within the constitutional guarantee against interference, the common law doctrine of the unity of the husband and wife has been obliterated, so far as property rights are concerned, a

married woman is a *feme sole*, and personal chattels brought into that State from a foreign State, and being at the time her separate estate, continues to remain her personal estate, citing as to these propositions Leete v. State Bank, 115 Mo. 184; Flesh v. Lindsey, 115 Mo. 1; State v. Chatham Nat. Bank, 80 Mo. 626, and also calling attention to the language of Judge Blodgett, of the Supreme Court of New Hampshire, in Shute v. Sargent, 36 Atl. Rep. 282. "The husband," says Judge Wood in conclusion, "seeks to enforce in this court his common law marital right to his wife's property, claiming that such is the law of his domicile, and his domicile is the domicile of his wife. In short, he is seeking to enforce a common law marital right. The reasons for the law which merged her identity in his, and by which he also absorbed her property, no longer exist, and the reasons failing, the rule should no longer be regarded. It would be strange, indeed, if our laws protected the separate personal property of a married woman bringing such property here, but afforded no such protection to a married woman who had never, during coverture, resided outside of this State, and whose property had always remained within its jurisdiction. The common law is not enforced when repugnant to the statutes of this State or the decisions of our court. For the same reasons it cannot be enforced on principles of comity. Nothing requires us to love our neighbors better than ourselves, and give to a New York husband that which we would deny to a citizen of this State marrying here. Since the law puts a wife on an equality with a husband, so that he now has no more dominion over her property than she has over his, and since the rule, born of a barbarous age, that the husband and wife are one, and the husband is that one, no longer exists, no reason would seem to remain why she may not have a separate domicile for every purpose known to the law."

NOTES OF IMPORTANT DECISIONS.

TRADE-MARK — NAMES — ORIGINALITY.—The Supreme Court of Missouri holds, in Oakes v. St. Louis Candy Co., 48 S. W. Rep. 467, that the name of "What is it?" as applied to a new kind of candy, does not point out the origin or ownership of the article, so as to give trade-mark rights in the name, where the proprietor has no exclusive property in the article itself; that the phrase "What is it?" is not an original, arbitrary name, so as to entitle the user to be protected in the exclusive use thereof; that where the maker of a certain kind of candy never attached or stamped his alleged trade-mark on the candy itself, but distinguished his candy merely by a display card bearing the trade-mark in his own show cases and windows, he acquired no rights to the trade-mark; that the recording of a name as a trade-mark of itself has no effect whatever in giving the name the quality of a trade-mark, if it was not already such according to the trade-mark law. It appeared herein that a candy manufacturer by the name of Oakes sold a certain kind of candy under the name of "Oakes' What is it?" Defendant sold like candy as "Hawthorne's What is it?" Held not to show unfair competition. The court says: "This court, in Liggett & Myers Tobacco Co. v. Sam Reid Tobacco Co., 104 Mo. 53, 15 S. W. Rep. 843, said: 'The general principles of law concerning trade-marks are well-settled. A person has a right to the exclusive use of marks, form, or symbols appropriated by him for the purpose of pointing out the true origin or ownership of the article manufactured by him. The limitation upon this right is that such designs or words may not be used for the simple purpose of naming or describing the quality of the goods; for to permit that would be to foster a monopoly, while the great purpose of the law of trade-marks is to protect the owner in the exclusive use of his device which distinguishes his product from other similar articles.' The office of a trade-mark is to point out distinctly the origin or ownership of the article, and, unless it does so indicate the ownership or origin, neither the person who has adopted the mark or device can be injured by its appropriation by others, nor can the public be deceived. Canal Co. v. Clark, 13 Wall. 311. Keeping in view 'the limitation' announced by this court in Liggett & Myers Tobacco Co. v. Sam Reid Tobacco Co., 104 Mo. 53, 15 S. W. Rep. 843, it will be observed that plaintiff, having accidentally discovered a new kind of confection, named it 'What is it?' Can it be questioned that, under the facts of this case, this action of plaintiff amounted to nothing more than a designation of the article itself, instead of a definite designation of the origin or ownership thereof? As well said by Judge Duer in Fetridge v. Wells, 4 Abb. Prac. 144, 13 How. Prac. 385: 'When a new compound or preparation is offered for sale, a distinctive and specific name must necessarily be given to it. The name thus given to it, no matter when or by whom imposed, becomes by use its proper appellation, and fares as such in our common language. Hence all who have an equal right to manufacture and sell the article have an equal right to designate and sell it by its appropriate name, the name by which it alone is distinguished and known; provided such person is careful to sell the article as prepared and manufactured by himself, and not

by another. When this caution is used, there is no deception of which a rival manufacturer, by whom the distinctive name was first invented or adopted, can justly complain. In short, an exclusive right to use, on a label or other trade-mark, the appropriate name of a manufactured article, exists only in those who have an exclusive property in the article itself.'

"Now, in this case the plaintiff, Oakes, having given the name of 'What is it?' to this peculiar kind of candy, he has estopped himself from the exclusive right to the use of that name, and he has no exclusive right to manufacture and sell this particular confection. The phrase 'What is it?' as pointed out by Judge Klein, has been in common use to designate a non-descript animal or thing ever since the world-renowned showman, P. T. Barnum, applied it to the supposed wonderful animal which he exhibited by that name. Barnum's Autobiography, p. 325. While it is generally held that the inventor of an arbitrary name may apply it to an article manufactured by him, to distinguish his manufacture from that of others, and will be protected in the exclusive use thereof, that doctrine cannot avail plaintiff in this case, because the phrase 'What is it?' was in no sense originated by him. It was in common use when he first applied it to his candy, and cannot at this late day be made the subject of a trade-mark. Now, has he done those things which entitle him to acquire it as a trade-mark, if such a thing could be done? A trade-mark which is not in some manner attached or affixed or stamped on the article indicated by it involves a contradiction in itself, the idea of some distinctive brand or mark being inherent in the expression itself. An article can only be said to be distinguished by a trade-mark when that mark is connected with, annexed to, or stamped, printed, carved, or engraved upon, the article as it is offered for sale. Manufacturing Co. v. Merkel, 1 Mo. App. 305; Browne, Trade-marks, § 311; Rowley v. Houghton, 2 Brewst. 303; Cox, Trade-mark Cas. 486; Candee v. Deere, 54 Ill. 439; Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 11 Sup. Ct. Rep. 396. The conceded facts show that plaintiff never attached or stamped this device, 'What is it?' upon the candy itself. Consequently, when it left his store, there was nothing to indicate to purchasers or the trade the origin of this particular confection. It was only in plaintiff's own store that he attempted to distinguish his candy from similar goods of other manufactures of candy, by a display card in his show cases and windows. Obviously, under these circumstances, this so-called 'trade-mark' gave no currency to his wares, and added nothing to the value of his goods. The recording of the claim had no effect whatever in giving it the quality of a trade-mark if it was not already such, according to the principles of law governing this subject. U. S. v. Braun, 39 Fed. Rep. 775.

"It remains only to be seen whether the views hereinbefore expressed collide with the opinion of this court in State v. Bishop, 128 Mo. 373, 31 S. W Rep. 9. We think, most clearly, not. That was a criminal prosecution of a defendant for violation of an act of the general assembly of this State, (Laws 1893, p. 260), prohibiting the unauthorized use of a label adopted by a union of cigar makers, and furnished to cigar manufacturers employing union men only, and making a violation of said act a misdemeanor. One of the contentions in that case was that the cigar makers' label was not a trade-mark in its proper legal sense; and the opinion concedes that, but sustains the constitutionality of the statute, holding that the statute not only protected a technical trade-mark, but any other insignia, label, or symbol which may be or has been adopted by any association or union of workingmen as a trade-mark. No such question is involved in this record, and there is nothing in that case that intimates that the essential requirement of a trade-mark—viz., that it be attached, affixed, stamped, or engraved upon the article itself—can be dispensed with; and the views herein expressed do not militate with that decision.

"Finally, we agree with the learned circuit judge that the case presented is devoid of any element of fraud showing unfair competition. The St. Louis Candy Company never used the name at all, and defendant Wamsganz never at any time palmed off his candy as the manufacture of plaintiff. He sold it as 'Hawthorne's What is it?' and not as 'Oakes' What is it?' and this he had a perfect right to do. In Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 546, 11 Sup. Ct. Rep. 400, it was said: 'In all cases where rights to exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of goods of one manufacturer or vendor as those of another, and that it is only when this false representation is directly or indirectly made that the party who appealed to a court of equity can have relief. This is the doctrine of all the authorities; hence the trade-mark must either by itself or by association point distinctively to the origin or ownership of the article to which it is applied. The reason for this is that, unless it does, neither can he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived.'"

RAILROAD COMPANY—NEGLIGENCE—INJURIES SUSTAINED THROUGH OBJECTS THROWN FROM RAILROAD TRAINS.—The case of McGrath v. Eastern Ry. Co., 77 N. W. Rep. 136, recently decided in the Supreme Court of Minnesota, raises and passes upon a close question of law. It appeared that plaintiff, while standing on a platform beside a railroad track, was struck and injured by a bundle thrown from a rapidly moving train by a news agent, who was not a servant of the railway company. It had for a long time been the practice to throw newspapers off at this point, and in a few instances heavier bundles were thrown off;

but the place had but few inhabitants, was in a thinly-settled portion of the State, and it does not appear by the evidence that people were in the habit of congregating on this platform when the trains passed by. In an action against the railway company for damages for this injury, it was held that the evidence did not show that the practice was dangerous, and would not sustain a verdict for plaintiff. The court said: "Mansfield is a stopping place on the railroad of the defendant, and was used mainly as the point at which to deliver supplies for a logging camp in the woods, and had but few inhabitants. A passenger train known as the 'Limited' ran through the place every day, at a high rate of speed, without stopping. Plaintiff was employed in receiving supplies and sending them to the camp, and on the day in question was standing on the platform when the train passed by. A bundle of pamphlets and periodicals, weighing about fourteen pounds, thrown out of the baggage car, struck him on the leg, broke it, and otherwise injured him. This action was brought to recover damages for the injury. On the trial the court ordered a verdict for defendant, and from an order denying a new trial the plaintiff appeals.

"The package was thrown off by one Cole, a news agent on the train. He received the package from one Bergen at Princeton, another station on the road, and was requested by Bergen to take the package to Mansfield, and deliver it there. Taking the package to Mansfield, and delivering it there, was wholly outside of the line of the business of Cole as news agent, and seems to have been done to save the express or freight charge. By the terms of the contract between defendant and Cole, he was granted the privilege of selling books, newspapers, fruit, cigars and confectionery on its trains. It agreed to carry him and his merchandise on the trains for that purpose, and he agreed to pay for this privilege a certain sum per year. It was further agreed that he should at all times be under the control and orders of the conductor on the train. Notwithstanding this, Cole was not the servant of defendant, and the doctrine of *respondeat superior* does not apply. But there was some evidence tending to prove that it had been the practice for years to throw bundles off the moving trains at this point; and appellant contends that the jury were warranted, on this evidence, in finding that defendant knew of this practice, and was negligent in failing to stop it. Defendant was not negligent in failing to stop it, unless the practice was dangerous in itself, or the persons engaged in it were careless. The practice of throwing heavy bundles off a moving train onto a platform where people congregate in any considerable numbers is dangerous, and the railroad company may be negligent in permitting such a practice. Galloway v. Railway Co., 56 Minn. 346, 57 N. W. Rep. 1058. But the evidence does not show that people were often on this platform when the train passed. The evidence fails to disclose that more than one or two people were usually in or about Mansfield when the limited passed through the place. Again, most of the packages thrown off the train were bundles of daily newspapers, containing from one to six newspapers in a bundle, which would not be likely to do much injury by striking a person. In a few instances during the five or six years before the injury heavier bundles were thrown off. This evidence would not warrant the jury in finding that the alleged practice was dangerous. This is the only question raised having any merit, and the order appealed from is affirmed.

"The *New York Law Journal*, in commenting on this case, says: 'In Snow v. R. R. Co., 136 Mass. 552, it was held by the Supreme Judicial Court of Massachusetts that a passenger, waiting at a railroad station in a proper place and using due care, might recover for injury through being struck by a mail bag thrown from a moving train in accordance with a custom known to the company. In Walton v. Car Co., 139 Mass. 556, it was, on the other hand, held, by the same court, that a sleeping car company was not liable for injuries sustained through the throwing by the porter on a parlor car, from his car, of a bundle containing his soiled clothing and other personal property, solely for his own convenience, there being shown in the latter case only a single act of the kind, and the act itself not being within the scope of the employee's authority.

"In this latest Minnesota case the factors appear, first, that the person throwing the bundle from the train was not an employee of the defendant, and, therefore, that the rule, *respondeat superior*, technically, would not apply; and second, that there was sufficient evidence from which it might have been found that the defendant was chargeable with notice of the custom of throwing bundles off moving trains at the point at which the casualty occurred. The vital controversy would, therefore, seem to narrow down to the consideration whether a railroad corporation might suffer the practice of throwing objects from trains to continue at stations where few legitimate standers-by were to be expected, although it could not, without assuming liability, permit such practice at stations where large numbers of persons were in the habit of congregating. Under all the circumstances we are of opinion that, theoretically, it would have been more legitimate to submit the question of negligence to the jury. The fact that the plaintiff may have been a licensee, as distinguished from a passenger, does not seem to us to cut any material figure. If the railroad company systematically permitted the throwing of objects which might prove dangerous, from moving trains, it would seem that it should be chargeable with the same relation to all persons whose presence at stations was naturally to be expected for perfectly legitimate reasons, as to those actually holding tickets for transportation.

"The Minnesota case is a close one, but it may aid in weighing its comparative authority to read the decision of the Supreme Court of the United

States in Fletcher v. Baltimore & P. R. R. Co., 18 Sup. Ct. Rep. 45. It appeared that a railroad employee, after finishing his day's work and leaving the grounds of the company, was injured while moving along a highway by the side of the railroad track, by the throwing off of firewood from a moving train by employees of the company. It further appeared that such employees were allowed the privilege of bringing back with them, for their personal use, sticks or refuse timber left over from their work after repairing the road. 'It was the constant habit of the men, during all these years, to throw off these pieces of firewood while the train was in motion at such points on the road as were nearest their homes, where the wood was picked up and carried off by some of the members of their families or other persons waiting there for it. The only caution given the men on the part of the servants or agents of the company was that they should be careful not to hurt anyone in throwing the wood off.' The Supreme Court of the United States held that the person so injured did not, at the time of such injury, bear the capacity of a fellow-servant of the employees who threw off the wood, and that the existence of a presumptive custom on the subject was sufficient, with evidence of the actual circumstances, to authorize the submission of the question of negligence to the jury, and might be adequate to support a finding of the company's liability in the premises."

ANIMALS — INJURY BY DOG — EXCEPTIONS TO STATUTE — NEGLIGENCE.— It was held by the Court of Appeals of Kentucky, in Bush v. Wathen, that under the statute of that State which provides that every person owning or keeping a dog shall be liable to the party injured for all damages done by such dog, the owner is liable for injury inflicted by his dog while under the control of a kennel club; that the proviso of the statute that "no recovery shall be had in case the person injured is, at the time, upon the premises of the owner of the dog after night, or engaged in some unlawful act in the daytime," being in a clause following that creating the liability, though in the same section, need not be negatived by the plaintiff in his petition; that the plaintiff cannot, by negativing in his petition exceptions to the statute which he is not required to negative, take upon himself the burden of proof, and thus get the concluding argument to the jury; and that the plaintiff's contributory negligence in teasing the defendant's dog, but for which the injury would not have occurred, is a defense to the action, it matters not when or where the injury was inflicted. The court says: "It was not necessary for the plaintiff to allege that he was not on Bush's premises after night, or engaged in some unlawful act in the daytime, when the dog injured him. When he alleged that Bush owned the dog, and that it bit and injured him, a cause of action was stated. There is no proviso in the enacting clause to be negatived; neither is there an exception in the clause making the owner liable to a party injured by his dog for the damage done by it. It reads: 'Every person owning, having or keeping any dog shall be liable to the party injured for all damages done by said dog.' There is a proviso, however, in the same section of the statute, but it is a separate and distinct clause; as much so as if it had been in a separate section. When there is an exception in the enacting clause, the plaintiff must negative it. If the exception is in a subsequent clause to that giving the cause of action, then, if it gives the defendant exemption from liability, he must plead it.

"1 Chit. Pl. (8th Am. Ed.) 222, states the rule as follows, to-wit: 'In pleading upon statutes, where there is an exception in the enacting clause, the plaintiff must show that the defendant is not within the exemption; but, if there be an exception in a subsequent clause, that is matter of defense, and the other party must show it to exempt himself from the penalty.' And on the next page (Chitty) Lord Tenterden is quoted as follows: 'If an act of parliament or a private instrument contain in it, first, a general clause, and afterwards a separate and distinct clause, something which would otherwise be included in it, a party relying upon the general clause, in pleading, may set out that clause only, without noticing the separate and distinct clause which operates as an exception. But, if the exception itself be incorporated in the general clause, then the party relying upon it must, in pleading, state it, with the exception.' Bliss, Code Pl. 202, says: 'When the exception is embodied in the body of the clause, he who pleads the clause ought to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to his adversary to show the proviso.' When exceptions to the general provision of a statute are found in a distinct clause, the plaintiff need not allege that he is not within them. Nichols v. Sennitt, 77 Ky. 630. The court said in Com. v. McClanahan, 2 Metc. (Ky.) 10: 'It is well settled that, where provisos and exceptions are contained in distinct clauses, it is not necessary to aver in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains. Nor is it necessary to allege that he is not within such provisos, even though the purview should expressly notice them; as by saying that none shall do the act prohibited, except in the cases thereinafter excepted. These are properly matters of defense.'

"The rule of pleading which requires the exception, when embodied in the body of the clause, to be pleaded by him who pleads the clause, is well illustrated in the case of Becker v. Crow, 7 Bush, 201. That action was authorized by an act which reads as follows: 'That the widow and minor child or children, or either or any of them, of a person killed by the careless or wanton or malicious use of firearms or other deadly weapons, not in self-defense, may have an action against

the person or persons who committed the killing, and all others aiding or promoting the killing, or any one or more of them, for reparation of the injury, and in such action the jury may give vindictive damages.' The act gave the right of action to the widow or child of a person killed by the careless or wanton or malicious use of firearms or other deadly weapons, not in self-defense. The words 'not in self-defense' were in the body of the clause. Therefore it was necessary to negative it. The rule is again illustrated in the case of Railroad Co. v. Belcher, 89 Ky. 194, 12 S. W. Rep. 195. The statute under which the action was brought reads as follows: 'If, by the locomotives or cars of a railroad company, cattle or other stock shall be killed or injured on the track of said road, adjoining the lands belonging to or in the occupation of the owner of such cattle or stock, who has not received compensation for fencing said land along said road, the loss shall be divided between the railroad company and the owner of such cattle or stock. * * *' The court was of the opinion that the plaintiff could not recover if the owner of the land had been compensated for fencing it, and that it was necessary to allege that he had not received such compensation. As a reason for so holding that it was necessary to make the allegation, the court said: 'If, then, under this section of the statute, the facts alleged by the plaintiff could be admitted, and still, by reason of the very clause upon which the recovery depends, a state of fact might exist preventing the recovery, the existence of such facts must be negatived by his pleading.'

"If Wathen had been injured while he was on Bush's premises at night, or when he was engaged in some unlawful act in the daytime, the defendant should have pleaded it as a matter of defense. He did not do this, but alleged that Wathen came to the stall where the dog was kept and chained, and partially threw his hands and face and body into the stall, and handled and annoyed the dog, and continued to do so notwithstanding he was cautioned to desist from such conduct by parties standing near by, and warned that the dog, excited by the presence of a large crowd, and worried by the heat and noise, and fatigued, might attack and bite or in some way injure him if he continued to handle and annoy him. The language of the statute which exonerated the owner of a dog from liability for such injuries as it might inflict does not embrace the defense stated. If the statute, literally construed, does not embrace the defense stated, a party might be doing some 'unlawful act' in the nighttime off of the premises of the owner when he was injured by a dog, still the owner would be liable for such injury as he might inflict on such one. Under the statute, if the party is upon the premises of the owner at night, and doing no unlawful act, still, if the dog bites him, the owner is not responsible. We are of the opinion that although the party is injured by the dog while away from the premises of the owner at night, or is injured in the daytime when not engaged in some unlawful act, still, if the party injured was guilty of some act except for which the dog would not have bitten him, he is guilty of contributory negligence, and cannot recover damages for the injury sustained. We are of the opinion that the alleged acts of the boy in teasing the dog are not such as the general assembly intended to embrace by the words 'unlawful acts.' The doctrine of contributory negligence applies to the case of injury by animals. Cooley, Torts, 346. The principle of law which requires the exercise of reasonable care to avoid doing injury to others also requires the exercise of reasonable care to avoid being injured by the negligence of others; and, as a general rule, one cannot recover compensation for injury occasioned by the mere negligence of another which he might have avoided by the exercise of reasonable care. If the injury would not have happened to him but for his own want of ordinary care, he cannot legally charge to the negligence of the other party the consequence of his own carelessness. It may be said that this rule of law has been changed by the statute. The statute is remedial. It imposes no penalty, but simply makes the owner responsible for the damages sustained by reason of injury inflicted by the dog. It gives a remedy for enforcing the common-law right for the recovery of damages for the actual injury sustained, and should be given a reasonable interpretation. It would not be a reasonable interpretation to wholly disregard the general principle of contributory negligence. It, in part, was intended to obviate the difficulty which existed at common law of showing the owner's knowledge of the vicious propensities of the dog in an action for damages; and the interpretation which we give accomplishes that object. In Quimby v. Woodbury, 63 N. H. 370, the court construed a statute substantially the same as the one here construed, and said: 'A construction of the statute making the owner of a dog absolutely liable for injuries, regardless of the conduct of the party injured, might in some cases hold the owner responsible for injuries occasioned solely by the reckless carelessness of the party injured. It would make the owner liable to a person injured while intentionally exposing himself by worrying and irritating a dog for the purpose of testing his temper and disposition. Such a construction would be unreasonable.' "

INTERFERENCE OF THIRD PARTIES IN CONTRACTS OF OTHERS.

1. The General Doctrine.
2. Rule Applies to All Contracts.
3. Restricting the Rule to Servants.
4. When the Period of Employment is Uncertain.
5. Doing an Act which Is Legal in Itself.
6. Fraudulent Representations.
7. To Sustain an Action the Discharge Must Take Place.

8. Trades Unions.
9. Injunction against Publication of Boycotting Circular.

1. *The General Doctrine.*—A contract does not impose a duty upon parties not in privity, yet it does impose a duty not to interfere with its operation. So when a party interferes maliciously and procures the discharge of an employee, the latter has an action for damages against the former if injury has resulted to the complainant by such discharge.[1] So boycotts with unlawfulness and malicious intent are illegal. For every person has a right, as between his fellow-citizen and himself, to carry on his business, within legal limits, according to his own discretion and choice, with any means which are safe and healthful, and to employ such persons as he may select; and every other person is subject to the correlative duty arising therefrom to refrain from any obstruction of the fullest exercise of this right, which can be made compatible with the exercise of similar rights by others.[2] No one has a right to interfere with the business of another, his occupation, profession, or way of obtaining a livelihood, and it does not matter whether the interference is tainted with any moral turpitude or not.[3]

2. *Rule Applies to All Contracts.*—The general rule is that a third party has no right to interfere in any contract whether it be between master and servant or other parties. So remedies given by the common law in cases of malicious interference of third parties are not, in terms, limited to any description of servants or service; so in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages.[4] Thus, where a third party has maliciously influenced an opera singer to break an engagement to sing at a theater, the plaintiff may recover damages from the wrongdoer.[5] An action will lie for the malicious procurement of a breach of contract, though not for personal service, if by the procurement damage is intended to result and does result to plaintiff.[6]

3. *Restricting the Rule to Servants.*—One line of cases holds that the malicious interference of a third party does not give the party injured any right of action, unless he be an apprentice, menial servant or any other whose means of living are by manual labor; but this exception exists by virtue of statute.[7] Thus, where this statute is adopted, if the defendant maliciously interferes and prevents a performance of a contract, not for labor, the plaintiff has no remedy for damages sustained.[8] In those jurisdictions where the statutory provision has not been adopted, the interference of a third person in any kind of a contract is a cause of action for damages.

4. *When the Period of Employment is Uncertain.*—Neither the fact that the term of service interrupted is not for a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement, is of itself a bar to an action against a third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. So long as the employer is willing and ready to perform,

[1] Chipley v. Atkinson, 23 Fla. 206; Jones v. Blocker, 43 Fla. 331; Walker v. Cronin, 107 Mass. 555; Lucke v. Clothing Cutters, 77 Md. 396; Jones v. Stanly, 76 N. Car. 355; Haskins v. Royster, 70 N. Car. 601; Lumley v. Gye, 2 El. & Bl. 216; Gregory v. Brunswick, 6 Man. & G. 205; Perkins v. Pendleton (Me.), 38 Atl. Rep. 96; Temperton v. Russell (1893), 1 Q. B. 715; Carew v. Rutherford, 106 Mass. 1; Van Horn v. Van Horn, 52 N. J. L. 284; Curran v. Gales, 22 N. Y. Sup. 826; Bradley v. Pierson, 148 Pa. St. 502; Moores v. Bricklayers' Union (Ohio), 23 W. L. Bul. 48; Delz v. Winfree, 80 Tex. 400; Jackson v. Standfield, 139 Ind. 592; Bixby v. Dunlap, 56 N. H. 456; Mapstick v. Range, 9 Neb. 390; Barr v. Trades Council, 53 N. J. Eq. 101; Garrett v. Taylor, Cro. Jac. 567; Kechle v. Hickeringill, 11 East, 574; Young v. Hichens, 6 Ad. & E. 606; Bowen v. Hall, 6 Q. B. D. 333; Vegelahn v. Gunter, 167 Mass. 92.

[2] Barr v. Trades Council, 53 N. J. Eq. 101; Hilton v. Eckersley, 6 El. & Bl. 47. See also Mogul Steamship Co. v. McGregor, 23 Q. B. D. 608; Toledo, etc. Co. v. Penn. Co., 54 Fed. Rep. 730; Hopkins v. Stave Co., 83 Fed. Rep. 912; Exchange Tel. Co. v. Gregory, 73 Law T. 120.

[3] Doremus v. Hennessy, 62 Ill. App. 391; Bowen v. Hall, 6 Q. B. D. 33; O'Neill v. Behama (Pa.), 37 Atl. Rep. 843; Lumley v. Gye, 2 El. & Bl. 216; Mogul Steamship Co. v. McGregor, L. R. 21 Q. B. 544, 553, 23 Q. B. 598.

[4] Temperton v. Russell (1893), 1 Q. B. 715; Bowen v. Hall, 6 Q. B. D. 339; Haskins v. Royster, 70 N. Car. 601.

[5] Lumley v. Gye, 2 El. & Bl. 216, 228.

[6] Lumley v. Gye, 2 El. & Bl. 216; Haskins v. Royster, 70 N. Car. 601; Chipley v. Atkinson, 23 Fla. 206; Walker v. Cronin, 107 Mass. 555; Bowen v. Hall, 6 Q. B. D. 339; Jones v. Blocker, 43 Ga. 331; Lucke v. Clothing Cutters, 77 Md. 396; Doremus v. Hennessy, 62 Ill. App. 391; Tarlton v. McGawley, Peak N. P. C. 270; Clifford v. Brandon, 6 Man. & G. 205; Garrett v. Taylor, Cro. Jac. 567.

[7] Statute of Laborers, 25 Edward III., 2.

[8] Chambers v. Baldwin, 91 Ky. 121; Ashby v. Dixon 48 N. Y. 579; Boyson v. Thorn, 98 Cal. 579; Hywood v. Tillson, 75 Me. 225; Payne v. Railroad Co., 13 Lea (Tenn.), 507; Glencoe Sand Co. v. Hudson (Mo.), 40 S. W. Rep. 93; Boufier v. Macauley, 91 Ky. 135.

it is not the legal right, but the wrong on the part of a third party maliciously and wantonly to procure the employer to terminate or refuse to perform the contract, which makes the third party liable. A servant who is earning a livelihood or otherwise enjoying the fruits and advantages of his industry or enterprise or skill, has a right to pursue such employment undisturbed by mere malicious or wanton interference.[9] And for a master to maintain an action it is enough if the service is one at will, if subsisting when interrupted by an unlawful act,[10] and this rule applies as to the employee.[11]

5. *Doing an Act Which is Legal in Itself.*—Where one does an act which is legal in itself and violates no right of another person, it is generally held that the fact that the act is done from malice or other bad motive toward another, does not give the latter a right of action against the former. Though there be a loss or damage resulting to the other from the act, and the doer is prompted to it solely by malice, yet if the act be legal and violates no legal right of the other person there is no right of action to the injured person.[12] A late case in England[13] does not seem to be consonant with American decisions. This is a case where a walking delegate caused the dismissal of an employee who was working by the day with no specified time agreed upon. The house of lords held that no action would lie against the persuading party for dismissal, as the employment was not for a specified time, but from day to day, being thus liable to be discharged at any time, so no action would lie against the party procuring the discharge, however malicious may have been the motive. The defendant, in other words, only induced the employer to do what he had a right to do. Hence, since no legal right had been violated, no legal injury was done the plaintiff or employee.[14] The doctrine is that a lawful act is not converted by a malicious or bad motive into an act so as to subject the doer to an action at law. If it is a lawful act, however ill the motive may be, the party has a right to do it. If it is an unlawful act, however good the motive may be, he will have no right to do it.[15] The case of Allen v. Flood[16] deals with the ingredient of malice in giving a right of action for inducing a breach of contract. The parties in this case were members of rival trades unions of workingmen, employed by the Glengall Iron Company in repairing an iron ship. The workmen of the different unions could not work together in peace. So the Glengall Iron Company was persuaded by the iron workers to discharge the ship carpenters because they had at one time worked in iron as well as in wood. The discharged men were employed from day to day for no specified time, so the company could discharge them at the close of any day. The house of lords said as no action would lie against the Glengall Iron Company by the discharged workmen, as the employment was not for a specified time, but from day to day, being liable to be discharged at any time, so no action would lie against the rival workmen who procured their discharge, however malicious might have been their motive. Accordingly, as no legal right had been violated no legal injury was done them. Merely to persuade a person to break his contract may not be wrongful in law or fact. But if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and an actionable act if injury ensues from it.[17]

But the house of lords have now distinctly laid it down that the gist of the action is the procuring breach of contract. Even when the defendant has procured a contract to be violated, yet, in order to ground an action, he should have done this knowingly. In Lumley v. Gye,[18] and Bowen v. Hall,[19] it is decided that for A to induce B to break his contract with C, gives C a right of action against A, provided injury results to C, and

[9] Chipley v. Atkinson, 23 Fla. 206.

[10] Salter v. Howard, 43 Ga. 601; Sykes v. Dixon, 9 Ad. & El. 244.

[11] Flood v. Jackson (1895), 2 Q. B. 21. See also Doremus v. Hennessy, 62 Ill. App. 391. Compare Raycroft v. Tayntor, 68 Vt. 219; Allan v. Flood (1898), App. Cas. 1.

[12] Bradford Corporation v. Pickles (1895), App. Cas. 587.

[13] Allen v. Flood (1898), App. Cas. 1.

[14] See also Perrault v. Gauthier (Canada), 28 Sup. Ct. Rep. 241; Huttley v. Simmons, 14 T. L. R. 150. Compare Carryington v. Taylor, 11 East, 571.

[15] Bradford Corporation v. Pickles (1895), App. Cas. 594; Bromage v. Prosser, 4 B. & C. 255; Stevenson v. Newham, 13 C. B. 297.

[16] (1898) App. Cas. 1.

[17] Bowen v. Hall, 6 Q. B. D. 333; Lumley v. Gye, 2 El. & B. 216.

[18] 2 E. & B. 216.

[19] 6 Q. B. D. 333.

provided A's conduct was malicious. The pith of the civil wrong, as laid down by these cases, which gives rise to the action, is the malicious intention. In Temperton v. Russell[20], and in Allen v. Flood,[21] the complaint was that the defendant had obstructed the plaintiff in carrying on his business by preventing him from making a contract, and since this conduct was malicious there was a good cause of action. There was the same wrongful intent in both cases, wrongful because malicious. It is a fine distinction to say that where a person maliciously induces a person not to carry out a contract already made with the plaintiff, and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would have entered into, it is not actionable. The reason for a distinction between the two cases appears to be that, in the one case, the act procured was the violation of a legal right for which the person doing the act which injured the plaintiff could be sued, as well as the person who procured it, while in the other no legal right was violated by the person who did the act from which the plaintiff suffered. In Allen v. Flood,[22] the element of unlawfulness which amounts to a civil wrong was absent. Allen procured the Glengall Iron Co. to break no contract with the plaintiff, nor, in intimating that the ironworkers would, in a certain event, exercise their undoubted right of leaving work, did he do anything unlawful. The action must, therefore, be based solely on malice, which the court said was not sufficient. To lawyers the point of chief importance is that malice or indirect motive, though producing damage to another, is no cause of action; that there must be some independent, unlawful act in connection therewith. This decision of Allen v. Flood has decided that interference by one man, A, with another man, B, in the course of his business or employment, no unlawful act being committed, is not actionable simply upon the ground that it is done with the intention of injuring B, or of benefiting A at the expense of B.

6. *Fraudulent Representations.*—Where a contract would have been fulfilled but for false and fraudulent representations of a third person, an action for damages will lie against such person, although the contract could not have been enforced.[23] And so an action will lie by a party to a contract against a third person for fraudulent representations by the latter, inducing the other party to the contract to break it.[24]

7. *To Sustain an Action the Discharge must take Place.*—An act done or attempt made by a third party with the malicious intent to procure such discharge, but not successful in procuring it, will not support an action brought for maliciously procuring the discharge. The actual procurement of the discharge is an essential to such an action.[25] And if the servant is not discharged, but voluntarily leaves the employment on account of the conduct of the party charged with having procured his discharge, the action cannot be maintained.[26]

8. *Trades Unions.*—The policy of trades unions sometimes conflict with the rights of master and servant. The later decisions, both in England and America, hold that trades unions are not unlawful combinations, so long as they do not resort to acts of violence, or endeavor to accomplish some end that is contrary to public policy. It is then not illegal *per se* for a union to adopt and endeavor to maintain a scale of wages, or to endeavor to limit and regulate the employment of apprentices.[27] The later English authorities concede that members of trades unions binding themselves not to work except under certain conditions, and to support one another in the event of being thrown out of employment, in carrying out the views of the majority, do not bring themselves within the criminal law, or make contracts against public policy.[28] And so the later American cases hold that trades unions, in the ordinary acceptation of the term, are not of themselves unlawful combinations. So a number of persons may associate themselves together,

[20] 1 Q. B. 715.
[21] (1898), App. Cas. 1.
[22] *Supra.*

[23] Benton v. Pratt, 2 Wend. (N. Y.) 385; Green v. Bulton, 2 Cromp., M. & R. 707.
[24] Rice v. Manley, 66 N. Y. 82; Ashley v. Dixon, 48 N. Y. 430.
[25] Chipley v. Atkinson, 23 Fla. 206.
[26] Chipley v. Atkinson, 23 Fla. 206. See also Reynolds v. Everett, 144 N. Y. 189; People v. Hughes, 137 N. Y. 29; People v. Baronders, 133 N. Y. 649.
[27] Longshore Printing Co. v. Howell, 26 Oreg. 527.
[28] Hornby v. Close, L. R. 2 Q. B. 151; Farrer v. Close, L. R. 4 Q. B. 602.

and agree that they will not work for or deal with certain men, or classes of men, or work under a certain price, or without certain conditions.[29] But if the purpose of organization or combination of workmen be to hamper or to restrain the right to contract, and through contracts or arrangements with employers to coerce other workingmen to become members of such unions, and to come under its rules and conditions, under a penalty of the loss of their position and deprivation of employment, the purpose of such organization is unlawful, because it is in conflict with that principle of public policy which prohibits monopolies and exclusive privileges, for it tends to deprive the public of the services of men in useful employments and occupations.[30]

9. *Injunction Against Publication of Boycotting Circular.*—The boycott condemned by law is one accompanied by violence or by threats which tend to overcome the will of others. So courts of equity will restrain by injunction the publication of a libel in a boycotting circular, where the result will be irreparable injury to, and destruction of, proprietary rights, and the acts are accompanied with threats and intimidation. Thus, where strikers picket the premises of the employer and are ready to distribute boycotting circulars which embody threatening language, the court will restrain the picketing and the distribution of the circulars. This is on the ground that while labor possesses freedom of action and of combination, yet that freedom does not include intimidation or coercion of others whose right to labor or to employ labor is equally free.[31]

Chicago, Ill. DARIUS H. PINGREY.

[29] Carew v. Rutherford, 106 Mass. 14; Snow v. Wheeler, 113 Mass. 186; Commonwealth v. Hunt, 4 Met. (Mass.) 134; Longshore Printing Co. v. Howell, 26 Oreg. 527; Beck v. Protective Union (Mich.), 77 N. W. Rep. 13; Macauley v. Tierney, 19 R. I. 255. As to the law relating to strikes, see United States v. Debs, 63 Fed. Rep. 436, 158 U. S. 564; United States v. Alger, 62 Fed. Rep. 824; *In re* Charge to Grand Jury, 62 Fed. Rep. 828.

[30] Curran v. Galen, 152 N. Y. 39; State v. Glidden, 55 Conn. 46; State v. Stewart, 59 Vt. 273; Callan v. Wilson, 127 U. S. 540; State v. Donaldson, 32 N. J. L. 151.

[31] Beck v. Protective Union (Mich.), 77 N. W. Rep. 13, and cases cited.

CORPORATIONS — RECEIVERS — TORTS — LIABILITY OF COMPANY.

BARTLETT v. CICERO LIGHT, HEAT & POWER CO.

Supreme Court of Illinois, December 21, 1898.

Where the net income derived from the business of a corporation during the receivership is diverted from the payment of the operating expenses, and applied to the permanent improvement of the corporate property, and the receiver is discharged and the property turned over to the corporation, it is liable for torts occurring during the receivership, to the extent of the net income so applied.

MAGRUDER, J.: The main question presented by the demurrer to the amended declaration in the present case is this: Where a corporation has been placed in the hands of a receiver, and an injury or death has been caused by the negligence of the receiver while he is operating the property of the corporation, and where by stipulation between the parties the receiver is discharged, and the property is restored to the possession of the corporation, can the corporation itself be held liable for damages for the injury so received during the receivership? As a general rule, a corporation, while its property is in the hands of a receiver, has no control over either the receiver or his servants, and, therefore, in the absence of any liability imposed by statute, is not responsible for the negligence or torts of the employees of the receiver, and no suit for damages occasioned thereby can be maintained against the corporation itself. But there is an exception to this rule which will be hereafter stated. The amended declaration in this case contains the following averment: "And the plaintiff avers further that during the receivership the said receiver had the entire management and control of the business of the defendant company, collected large sums due it, sold its bonds and other property, and applied the receipts to the running of the business of the company and to the improvement and betterment of the company's property, and that the said property at the close of the receivership was, without reservation, turned back into the possession of the company." We do not deem it necessary to discuss any other of the points made or questions raised by counsel, except that suggested by the averment of the declaration above quoted. In view of this averment, we are of the opinion that the court below erred in sustaining the demurrer to the declaration. The receiver holds the property in his possession as an officer of the court. But the appointment of the receiver does not dissolve the corporation. The corporation still remains in existence, and is still clothed with its franchises. The appointment of the receiver merely gives him the temporary management of the corporation under the direction of the court, instead of leaving it under the direction of the manager appointed by the directors of the corporation. Railroad Co. v. Van Slike, 107 Ind. 480, 8 N. E. Rep. 269; Railway Co. v. Russell, 115 Ill.

52, 3 N. E. Rep. 561; Heffron v. Gage, 149 Ill. 182 36 N. E. Rep. 569; Safford v. People, 85 Ill. 558; Railway Co. v. Beggs, *Id.* 80. By the appointment of the receiver the corporation's capacity of being sued is not affected. The receiver is legally the agent of the company, although under the direction of the court, and the title to the property is not devested by his appointment. Damages for injuries to persons or property during the receivership, caused by the torts of the receiver's agents and employees, are classed as a part of the operating expenses of the corporation. 20 Am. & Eng. Enc. Law, p. 385, and cases cited in note 1; Green v. Railroad Co., 97 Ga. 15, 24 S. E. Rep. 814; Sloan v. Railway Co., 62 Iowa, 728, 16 N. W. Rep. 331; Railway Co. v. McFadden, 89 Tex. 138, 33 S. W. Rep. 853; Peoples v. Yoakum, 7 Tex. Civ. App. 85, 25 S. W. Rep. 1001. Such damages, being part of the operating expenses, are accorded the same priority of payment as belongs to other necessary expenses of the receivership, and "will be paid out of the net income, if that is sufficient, but in the event of a deficiency they will be paid out of the *corpus*." 20 Am. & Eng. Enc. Law, p. 385, and cases in note. Where the net income derived from the business during the receivership is diverted from the payment of such operating expenses, and applied to the permanent improvement of the property of the corporation, and the receiver is afterwards discharged, and the property is again turned over to the corporation, in such case the corporation is liable for torts during the receivership, to the extent of the net income so applied. 20 Am. & Eng. Enc. Law, p. 389. In Railway Co. v. Johnson, 76 Tex. 421, 13 S. W. Rep. 463, it was held that a claim for damages caused by injuries inflicted through the negligence of a receiver while he was operating a railway was entitled to payment out of the current receipts; that, if the current earnings be invested by the receiver in the betterment of the road, which without sale was returned to the company with its other property at the close of its receivership, then the company must be held to have received the property, charged with the satisfaction of any claim which the receiver ought to have paid out of the earnings. Railroad Co. v. Bailey, 83 Tex. 19, 18 S. W. Rep. 481. The receivers in such cases are not personally liable upon their discharge for claims of this character, but the claims follow the property or fund which alone can be used to satisfy them. Gluck & B. Rec. (2d Ed.) pp. 494, 495, § 93. Not merely claims arising out of contracts, but claims for torts, arising through the negligence of the receivers or their subordinates, thus follow the property or fund. *Id.* Where the earnings of the road have thus been invested in betterments upon it, and the receiver has been discharged, and the property has been returned to the owner with such improvements, it necessarily follows that the company must be liable, because the receiver, by virtue of his discharge, ceases to be liable. Railway Co. v. Comstock, 83 Tex. 537, 18 S. W. Rep. 946; Boggs v. Brown, 82 Tex. 41, 17 S. W. Rep. 830; Railway Co. v. Johnson, 76 Tex. 421, 13 S. W. Rep. 463; Brown v. Gay, 76 Tex. 444, 13 S. W. Rep. 472. "Where the receiver is discharged, and the property restored with improvements, the company is liable for accidents during the receivership." 2 Cook, Stock, Stockh. & Corp. Law (3d Ed.), pp. 1447, 1448, § 875, note 2, and cases there cited. If such were not the law, great and irreparable injustice would be done in many cases. As a receiver is not personally liable for the torts of his servants, but only liable in his official capacity, and as the damages for such torts cannot be recovered in suits against him personally, or collected on execution against his individual property, a judgment rendered while the receiver is in possession should provide for its payment out of the trust fund, or the property in the hands of the receiver or under his control. McNulta v. Lockridge, 137 Ill. 270, 27 N. E. Rep. 452. In the case at bar, suit has not been brought against the receiver, but has been brought against the company, to which the trust fund or property was restored after the discharge of the receiver. In the absence of all personal liability on the part of the receiver, there is no reason why the trust fund or property should not be liable as well after the discharge of the receiver as while he is in office. Where the receiver has returned the property to the company, the fund or property remains the same; and the only difference in the circumstances is that it is in the possession of the company, instead of being in the possession of the receiver. In the case at bar, if the plaintiff has no remedy for the death of his intestate against the company, then he has no remedy at all, inasmuch as the receiver, during whose administration the death occurred, has been discharged from his office, and cannot be held personally liable.

The doctrine above announced has been well stated, and has been placed upon correct grounds, by Thompson in his Commentaries on the Laws of Corporations (volume 5, § 7151), where the author says: "The receiver becomes the new custodian of a property which was before, in a sense, a trust property in the hands of the corporation. In the management of this trust property, negligences are committed by his servants, for which, under the settled principles of law, the receiver is liable—not personally, except where he has been guilty of personal fault, but out of the trust funds in his hands. The liability is then essentially a liability of the fund, and not of the custodian. When, therefore, the fund is transferred to a new trustee, whether it be to a new and reorganized corporation created by the purchasers at a mortgage sale for the purpose of receiving and operating the property, or whether it be the original corporation, its former owner, to whom it is redelivered under a new arrangement, it is the case of a trust property, to which a liability has attached, passing into the hands of a new trustee. The trust property continues liable; but, from the very nature of the case, any action

brought to charge it must, if the receiver has been discharged prior to the bringing of the action, be brought against the corporation which is its custodian—that is to say, against the new trustee."

It is contended by counsel for defendant in error that a contrary doctrine to that here announced has been laid down by this court in the case of McNulta v. Lockridge, *supra*. But that case is not capable of the construction sought to be given to it. It is true that general expressions are there used to the effect that the corporation is not responsible for the negligence or torts of the employees of the receiver, but such expressions are to be understood as applying to the facts of the case. It was there held that an action can be maintained against one receiver for the torts of the servants of a preceding receiver; that the liability is enforceable against the fund, which is the subject of the trust, and follows such fund; that the judgment in such a case is in the nature of a judgment *in rem*, the *res* being the matter of the receivership; and that the plaintiff should not be deprived of his action, and of the right of trial by jury, because one receiver has succeeded another. The reasoning of the court in the McNulta case lends support to the doctrine that a company which receives its property back from the receiver improved and bettered, and after such property has been managed and operated for some time at an expense paid by the receiver out of the property, cannot escape liability for the torts of the receiver's agents or employees. If the corporation desires to set up that it is only liable for claims of this character to the amount of the net income during the receivership which has been applied to the improvement and betterment of the property, the fact of the payment of such claims to an amount equal to the value of the improvements, if such fact exists, presents a question which the corporation must raise by the pleadings. 20 Am. & Eng. Enc. Law, p. 390, and cases cited in note 1. The judgments of the appellate court and of the circuit court of Cook county are reversed, and the cause is remanded to the latter court, with directions to proceed in accordance with the views herein expressed. Reversed and remanded.

NOTE.—The conclusion reached in the principal case upon the facts in issue, is in harmony with all the decisions. A receiver appointed by a court takes possession of the property in the interest of all who may be interested in it. This possession is not adverse to other creditors, nor does it affect the priority of liens or rights existing against the defendant. Central R. Co. v. Buchanan, 90 Fed. Rep. 454; Central F. Co. v. Worcester, etc. Co., 90 Fed. Rep. 584. He is the agent of the court, and not of the owner of the property. Missouri, etc. R. R. v. McFadden, 89 Tex. 138. The expenses of the operation of a railroad by a receiver are the first charge against its earnings. Missouri, etc. R. R. v. McFadden, *supra*. Among such expenses are included claims for injuries to persons or to property. Mobile, etc. R. R. v. Davis, 62 Miss. 271. A receiver is chargeable for his personal negligence or wrongdoing, but his liability for the acts of his agents or employees is only official, and he is only chargeable therefor during his continuance in office, and judgments against him should provide for their payment out of the trust funds in his possession. Ryan v. Hays, 62 Tex. 42; McNulte v. Lockridge, 137 Ill. 270. He is not liable for torts committed prior to his receivership (Northern, etc. R. R. v. Heflin, 83 Fed. Rep. 93), nor after his discharge for claims for personal injuries accruing against a railroad company during his receivership. Missouri, etc. R. R. v. Wylie (Tex. Civ. App., January, 1896), 33 S. W. Rep. 771.

When is the Defendant Liable?—When a railroad is in joint possession of its property with the receiver it is liable for personal injuries sustained. Memphis, etc. R. R. v. Hoechner, 67 Fed. Rep. 456. When a receiver has possession of only a part of the road and the whole is run on joint account, it is liable for such injuries. R. R. Co. v. Brown, 84 U. S. 445. The company is also liable when its road is practically managed by its own agents and the receiver's functions are restricted to the receipt of its share of the net earnings. Penn. R. R. v. Jones, 155 U. S. 333. When the earnings have been expended by the receiver the company is liable for injuries to the extent of such betterments, as stated in the principal case, but such suit should be in equity and should allege such diversion of the earnings. Texas, etc. R. R. v. Huffman, 83 Tex. 286; Missouri, etc. R. R. v. McFadden, 89 Tex. 138; Texas, etc. R. R. v. Johnson, 151 U. S. 81; Mobile, etc. R. R. v. Davis, 62 Miss. 271. By a State statute it was provided that a railroad company would be liable for personal injuries incurred during the administration of a receiver after it received back its property, if it were proven that such property was of a value which might exceed or be equal to the judgment that might be recovered by the plaintiff if he recovered any. Missouri, etc. R. R. v. Wylie (Tex. Civ. App., January, 1896), 33 S. W. Rep. 771. It will also be liable if the appointment of the receiver was obtained by collusion between it and the plaintiff for purposes of its own, as in order to keep its property, for some time, out of the reach of a certain class of its creditors (Texas, etc. R. R. v. Johnson, 76 Tex. 421), or if the appointment is void. Missouri, etc. R. R. v. McFadden, 89 Tex. 138. Purchasers of a railroad at a judicial sale thereof are not liable for the negligence or torts of the receiver thereof prior to the confirmation of the sale, unless such liability is imposed on the property by the order of sale. Metz v. Buffalo, etc. R. R., 58 N. Y. 61; Ryan v. Hays, 62 Tex. 42; Missouri, etc. R. R. v. McFadden, 89 Tex. 138. Sometimes railroad companies are held liable for the non-performance of statutory duties, though their property was then in the hands of receivers. Ryan v. Hays, 62 Tex. 42. They have been required to pay taxes on their gross receipts, though earned during the possession of their property by a receiver (Philadelphia, etc. Co. v. Com., 104 Pa. St. 80), to pay twice the cost of a fence which it was its duty to build, and which the landowner built after notice to it (Ohio, etc. R. R. v. Russell, 115 Ill. 52), and to pay for cattle killed on their roads, where they had failed to fence their right of way. Kansas, etc. R. R. v. Wood, 24 Kan. 619; McKinney v. Ohio, etc. R. R., 22 Ind. 99; Indianapolis, etc. R. R. v. Ray, 51 Ind. 269. Judge Thompson (5 Thompson, Corp. 5671, § 7151) suggests that the true rule is to consider the *corpus* (the property) as a trust fund, and the owner thereof, whether company, receiver or purchaser, as merely a trustee, and to hold the *corpus* as liable for such claims in whosoever's hands it may be; otherwise he asserts the courts will flounder around in their decisions, and "their reason.

ing will give abundant sport to after-days." The writer has found one decision which partially supports this view in holding that operating expenses of a railroad, including claims for damages for personal injuries, should be paid out of the income of the railroad, and, if that is not sufficient, out of the *corpus*. Union Trust Co. v. Illinois, etc. R. R., 117 U. S. 434, 464. Another decision holds that such action is proper, if it was so provided in the order appointing the receiver. Davenport v. Receivers, 2 Woods C. C. 519.

S. S. MERRILL.

St. Louis, Mo.

JETSAM AND FLOTSAM.

BOYCOTTING, CONSPIRACY TO COMPEL A MAN TO PAY HIS DEBTS.

The decision of the Kentucky court of appeals in Brewster v. Miller, 41 S. W. Rep. 301, is more or less doubtful. An association of undertakers refused to sell the plaintiff a coffin, on the ground that they had a by-law providing that the members of the association were not to render services for, or furnish burial materials to, any person who had failed or refused to discharge an honest indebtedness to any member of the association; and that the plaintiff had so failed and refused. The Kentucky court proceeded upon the idea that one has no right of action against a merchant for refusing to sell him goods, and that a conspiracy to compel one to pay a debt he does not owe, gives him no right of action, unless he pays the money demanded. The decision is learned, but weak. It overlooks the principle that it is for the courts of law to determine whether or not a man does or does not owe a debt, and that it is not for an association of private individuals conclusively to determine that fact, so as to cut off his right to deal with any and every one of its members. The mistake of the Kentucky court seems to lie in holding that a public undertaker of funerals is engaged in a strictly private business. It is a public business, such as that of an innkeeper, a miller, or a carrier. It is quite different from that of a vendor of ordinary merchandise.—*American Law Review.*

INDICTMENT AND TRIAL FOR SECOND OFFENSE.

There is printed on the first page of this journal today the opinion of the New York Court of Appeals in People v. Sickles. The proceeding was a criminal one, and the question raised turned upon the judicial effect of the admission of the defendant that he had, theretofore, been adjudged guilty of a crime.

Under the present condition of New York criminal law, the decision in the present case is proper and convincing. It would seem that the majority of the court of appeals concerned themselves with a consideration of the law as it exists, and that the dissenting opinion referred to the law as it ought to be.

We believe that, substantially and outside of the technical questions presented, a criminal defendant will never get the full benefit of his presumption of innocence if the fact of his former conviction of a felony be placed before an average jury as an ingredient of the principal offense. Doubtless this is what Judge Finch had in mind when he said in People v. Raymond, 96 N. Y. 36, that "the first offense was not an element of nor included in the second, • • • but is simply fact in the past history of the criminal, which the law takes into consideration when prescribing punishment for the second offense." Nevertheless the court of appeals is clearly right in holding that no constitutional right of a criminal defendant is infringed by the existing statutory law.

A statutory amendment is suggested by the discussion in the opinions. It appears that in England the policy is not to allow a defendant's previous conviction to be shown until the principal charge has been passed upon by the jury. Philosophically this is the proper condition in which the law should be. For the very reason that our legal policy prescribes a severer penalty for the confirmed criminal, every precaution should be taken against unjustly convicting a man as an habitual offender. The English statute on this subject seems to be inspired by an enlightened public policy.—*New York Law Journal.*

BOOKS RECEIVED.

The Bankruptcy Law of the United States, comprising the Federal Act of 1898, and General Orders and Forms of the Supreme Court of the United States, with Tabulation, Time Table, and Tariff. By Theodor Aub, Referee in Bankruptcy, New York. Publication Office Eagle Building. Brooklyn-New York. Price One Dollar.

The Official Rules, Forms and General Orders in Bankruptcy Prescribed by the Supreme Court of the United States and Promulgated November 28, 1898. Copiously Annotated, Cross-referenced and Indexed, to which have been Added the Rules in Equity of the United States Courts, with an Index to the Same; and also a List of the Judges and the Clerks of the Courts of Bankruptcy, with the Official Addresses of the Clerks. By William Miller Collier, of the Auburn, N. Y., Bar, and one of the Referees in Bankruptcy for the Northern District of New York. Albany, N. Y.: Matthew Bender, 1899.

Pattison's Complete Digest of Missouri Reports, Embracing Volumes 1 to 137 of the Supreme Court Reports and Volumes 1 to 69 of the Reports of the Courts of Appeals. In Four Volumes. Volume III. By Everett W. Pattison, of the St. Louis Bar. St. Louis, Mo.: The Gilbert Book Company, 1899.

The American State Reports, Containing the Cases of Value and Authority Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated, By A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. 60. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers, 1898.

HUMORS OF THE LAW.

A countryman walked into the office of a lawyer one day and began his application. "Sir, I have come to get your advice in a case that is giving me some trouble."

"Suppose now," said the client, "that a man had a spring of water on his land and his neighbor living below should build a dam across the creek through both farms and it was to back the water up into the other man's spring, what ought to be done?" "Sue him, sir; sue him, by all means," said the lawyer.

"You can recover heavy damages, sir, and the law will make him pay well for it. Just give me the case and I'll bring the money from him."

"But stop," cried the terrified applicant; "it's I that have built the dam, and it's neighbor Jones that owns the spring, and he threatens to sue me."

The keen lawyer hesitated a moment before he tacked his ship, and then said: "Ah! well, sir, you say you built a dam across that creek. What sort of a dam was it, sir?"

"It was a mill dam."

"A mill dam for grinding grain, was it, sir?"

"Yes, it was just that."

"And it is a good neighborhood mill, is it?"

"So it is, sir, and you may well say so, sir."

"And all your neighbors bring their grain to be ground, do they?"

"Yes, sir—all save Jones."

"Then it is a great public convenience, is it not?"

"To be sure it is. I would not have built it but for that. It is far superior to any other mill, sir."

"And now," said the lawyer, "you tell me that man Jones is complaining just because the water from the dam happens to back into his little spring, and he is now threatening to sue you. Well, all I have to say is, let him sue and he'll rue the day as sure as my name is Gumption."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADMINISTRATION—Executors—Contesting Probate.—Executors named in a will, but who are not heirs, or otherwise interested in the will, cannot, under Code, § 3459, authorizing action by trustees of an express trust for the benefit of the *cestui que trust* or otherwise, contest probate of the codicil, revoking their appointment and appointing others.—IN RE STEWART'S ESTATE, Iowa, 77 N. W. Rep. 574.

2. ADVERSE POSSESSION—Running of Statute.—The running of the statute as to a tract of land of which one has adverse possession is not affected by a suit and adverse judgment against him, during such possession, as to another tract.—PARHAM V. DEDMAN, Ark., 48 S. W. Rep. 673.

3. ATTACHMENT—Subsequent Judgment and Execution.—The insolvent act of 1880 (section 17) provides that an adjudication in insolvency shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings. Held, not to affect an execution on a judgment in an action begun by attachment within a month preceding insolvency proceedings by the judgment debtor, where judgment was obtained before such proceedings, though prior attachments before judgment against the same debtor were thereby dissolved.—ELLIOTT V. WARFIELD, Cal., 55 Pac. Rep. 409.

4. ATTORNEY AND CLIENT—Disbursements.—Disbursements by an attorney employed to conduct business for an absent client need not necessarily be expressly authorized by the client in order to be a proper charge against him.—HASELTINE V. MAHAN, Kan., 55 Pac. Rep. 467.

5. BANKRUPTCY—Replevin by Creditor in State Court.—After a voluntary assignment for the benefit of creditors, a vendor of goods alleged to have been purchased by fraudulent representations assigned his claim, and the assignee thereof brought replevin against the voluntary assignee under which a promiscuous seizure was made by the sheriff of goods in possession of the voluntary assignee, including goods not described in the writ as well as goods manufactured and in process of manufacture; the next day involuntary proceedings in bankruptcy were commenced by creditors; on motion to restrain the sheriff from delivery of the goods seized, held (1) that section 23b of the act of July 1, 1898, does not limit the right of a trustee in bankruptcy to sue in such cases in the State courts, that clause being confined to suits which the bankrupt himself might have brought but for proceedings in bankruptcy; (2) that the abuse of the replevin process, other circumstances in the case, and the proper defense of the rights of creditors in bankruptcy, require that the delivery of the property by the sheriff should be restrained.—IN RE GUTWILLIG, U. S. D. C., S. D. (N. Y.), 90 Fed. Rep. 481.

6. BANKRUPTCY—Voluntary Assignment for Creditors.—Voluntary general assignments for the benefit of creditors made in conformity with the laws of the State of New York, though said laws are not treated as "insolvent laws" within the meaning of the last paragraph of the act of 1898, are voidable by the trustee of the debtor in bankruptcy if made within four months of the adjudication, because (1) incompatible with the purpose and policy of the bankrupt law, and the rights of creditors thereunder to the appointment of the trustee and the supervision of the assets in bankruptcy; (2) because in fraud of creditors within section 70 of the act, as the assignment deprives creditors of the important advantages secured to them under the act of 1898; and (3) because if not voidable the clause of section 3, making such an assignment *ipso facto* "an act of bankruptcy," would be practically nullified, and rendered of no use to creditors.—IN RE GUTWILLIG, U. S. D. C., S. D. (N. Y.), 90 Fed. Rep. 475.

7. BILLS AND NOTES—Collateral Security.—A creditor who holds a promissory note belonging to his debtor as collateral security for his debtor's note cannot be compelled to produce such note in court, and turn it over to his debtor, so long as the latter's debt remains unpaid.—CARSON V. BUCKSTAFF, Neb., 77 N. W. Rep. 670.

8. BILLS AND NOTES—Shares of Stock as Security.—One who executes a negotiable promissory note, and contemporaneously therewith an instrument by which he transfers to the payee of the note and his assigns shares of the stock in an incorporated company as se-

curity for the payment of the note, and designating a price in excess of the amount to become due on the note at its maturity, upon the payment of which the holder may become the absolute owner of the stock, and delivers such note and instrument to the payee with knowledge that he does not furnish the consideration for the note, and with the intent that he shall obtain the same from another, thereby vests such payee with authority to receive such original consideration, but not with authority to receive from the holder at the maturity of the note a tender of the difference between the price of the stock and the amount due upon the note.—RUMSEY v. LENTZ, Ohio, 52 N. E. Rep. 189.

9. BUILDING AND LOAN ASSOCIATIONS—Right to do Business.—Under Rev. St. 1894, § 4464 *et seq.* (Horner's Rev. St. 1897, § 3120 *et seq.*; Acts 1893, p. 274), prohibiting foreign building and loan associations from doing business in the State without complying with its terms, and obtaining a license, but providing that on revocation of such license the association may receive payments on stock loans previously made, an association which has lawfully made stock loans in the State before the passage of the act may receive payments thereon, though it has not complied with the terms of the act so that it can continue business.—EQUITABLE LOAN & INVESTMENT ASSN. v. PEED, Ind., 52 N. E. Rep. 201.

10. BUILDING AND LOAN ASSOCIATIONS—Usury.—Under Shannon's Code, § 3504, authorizing usury paid to be recovered by the borrower from the party receiving it, a shareholder who, having borrowed money from a building and loan association, on satisfactory terms, and without suspicion that the transaction was *ultra vires*, has discharged his obligation, and received in full settlement, on his withdrawal from the association, a sum which included his interest in the profits, partly earned from usurious dealings with himself and others, cannot recover the usurious interest paid by him, though the association was solvent, and, in two years after the settlement, wound up its business with a surplus, and though the borrower did not become a shareholder until the consummation of the loan.—MILNOR v. PEOPLE'S BUILDING & LOAN ASSN., Tenn., 48 S. W. Rep. 732.

11. CARRIERS OF GOODS—Contract of Carriage.—A carrier receiving goods billed for carriage beyond its own line is presumptively bound only to carry such goods to the end of its own line on their route, and to safely deliver them to the connecting line, to be forwarded; and it is not liable for loss or damage occurring after such delivery, except by special contract.—CINCINNATI, N. O. & T. P. RY. CO. v. N. K. FAIRBANKS & CO., U. S. C. C. of App., Sixth Circuit, 90 Fed. Rep. 467.

12. COMPROMISE AND SETTLEMENT—Duress.—A settlement between the parties to a deed of trust, at a time when the grantee had taken steps and was about to foreclose by a sale, according to his rights, is voluntary.—BARROW v. SOUTHERN BUILDING & LOAN ASSN., Tenn., 48 S. W. Rep. 736.

13. CONSTITUTIONAL LAW—Statutes—Special Legislation.—Act March 31, 1891 (St. 1891, p. 195), giving liens on the property of corporations for the wages of only such mechanics and laborers as may be employed by the week or month, is repugnant to the constitution prohibiting special legislation.—SLOCUM v. BEAR VALLEY IRR. CO., Cal., 55 Pac. Rep. 403.

14. CONTRACT—Damages.—Where, on an exchange of two parcels of land, the owner of one parcel retained a portion thereof in consideration of his agreement, which was part of the trade, to grade the streets opposite the lots conveyed by him, the measure of damages for a failure to grade such streets was the difference, at the time of breaching the contract, between the value of the property conveyed without the streets graded and its value had the streets been graded.—HAMPTON v. CO-OPERATIVE TOWN CO. OF TENNESSEE, Tenn., 48 S. W. Rep. 673.

15. CONTRACT — Reformation — Evidence—Option to Purchase Property.—Where parties, having, by a written contract, an option to purchase property therein described within a specific time, decline to make the purchase within that time, on the ground of a mistake in the description as expressed in the contract, and bring a suit to reform such description, and to enforce the contract as reformed, the court cannot, on an amended bill, extend the time within which the plaintiffs may elect whether or not they will accept the property as described in the contract, and decree a specific performance, as against the defendants, in the event of such acceptance.—POPE v. HOOPES, U. S. C. C. of App., Third Circuit, 90 Fed. Rep. 451.

16. CONTRACT—Reformation — Mistake.—Where parties, on the advice of counsel, deliberately adopted a mortgage to express their agreement for a deed subject to a right to repurchase, equity will afford them no relief by way of reformation.—ROGERS v. SMITH, Tenn., 48 S. W. Rep. 700.

17. CONTRACT—Specific Performance.—That a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for future arrangement.—KRUM v. CHAMBERLAIN, Neb., 77 N. W. Rep. 665.

18. CONTRACT—Substantial Performance.—To entitle a contractor to recover upon a building contract, which has not been fully complied with by him, under the doctrine of substantial performance, it must appear, not only that he endeavored to perform it in good faith, but also that he has done so, except as to unimportant omissions or deviations, which are the result of mistake or inadvertence, and were not intentional, and which are susceptible of remedy, so that the other party will get substantially the building he contracted for.—ANDERSON v. TODD, N. Dak., 77 N. W. Rep. 599.

19. CORPORATION—Knowledge of Officer.—The knowledge of an officer of a corporation in respect to an unauthorized transaction wherein such officer acted in his own interests, and adversely to those of the corporation, cannot be held to be the knowledge of the corporation.—HART PIONEER NURSERIES v. CORTELL, Kan., 55 Pac. Rep. 514.

20. CORPORATIONS—Liability of Stockholders.—In an action to hold liable to creditors of a corporation certain of its stockholders, because, as found by the court, the property conveyed by such stockholders in payment for their stock was greatly overvalued, a judgment against the stockholders was improperly rendered in view of the further finding that the defendants acted in good faith, and without any attempt to defraud said corporation or its creditors; the evidence being sufficient to sustain both findings.—PENFIELD v. DAWSON TOWN & GAS CO., Neb., 77 N. W. Rep. 672.

21. CORPORATIONS — Misappropriation by Officers.—Under Const. art. 12, § 3, providing that "the directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association during the term of office of such director or trustee," the only proper remedy of a creditor of a bank, where certain sums of money are alleged to have been misappropriated by a certain officer thereof, is a bill in equity, in which all the creditors are parties or represented, and under which there can be an accounting, after all the facts have been ascertained, as the moneys misappropriated constitute a fund for the benefit of all the creditors who have been injured by such wrongful acts.—WINCHESTER v. MABURY, Cal., 55 Pac. Rep. 393.

22. COUNTIES — Supplies Furnished Pauper.—To entitle one to recover from a county for services or supplies furnished to a pauper to whom such county owes the duty of support and care under the statute, it must appear that the services rendered and relief given were in pursuance of an authorization proceeding from some one having authority to bind the county.—ST. LUKE'S HOSPITAL ASSN. v. GRAND FORKS COUNTY, N. Dak., 77 N. W. Rep. 598.

23. CREDITORS' BILL—Fraudulent Conveyances—Executions.—The levy of an execution on real estate conveyed in fraud of creditors, and the recording of a certificate of such levy, where the execution was returned unsatisfied, and no sale was made in pursuance of the levy, do not give such judgment creditor priority over an equitable lien obtained by a junior judgment creditor by his filing a bill in equity to set aside such conveyance, since the issuing of the execution of itself had no effect to create a lien on such real estate,—none being created by the judgment,—and since the statute does not provide that the levy of the execution, or the recording of a certificate of such levy, shall give or create a lien.—UNION NAT. BANK OF CHICAGO v. LANE, Ill., 52 N. E. Rep. 361.

24. CREDITORS' SUIT — Transferee.—In an equitable action to subject the alleged fraudulently conveyed real property of a judgment defendant to the payment of the judgment against him, there is no sufficient foundation for an ordinary judgment against his transferee, as a co-defendant, if there is a failure to allege that the title of the said property by such transferee has been conveyed or subjected to a lien whereby the equitable relief sought has been rendered unavailable.—FIRST NAT. BANK OF PLATTSMOUTH v. GIBSON, Neb., 77 N. W. Rep. 662.

25. CREDITORS' SUIT — Pleading.—In an action by a judgment creditor, in the nature of a creditors' bill, under the provisions of section 501 of the Code (2 Gen. St. 1897, ch. 95), it is a necessary allegation of the petition that the judgment debtor has not personal or real property subject to levy on execution, or an allegation equivalent thereto.—MOYER v. RIGGS, Kan., 55 Pac. Rep. 494.

26. CRIMINAL EVIDENCE — Homicide — Character of Parties.—On a trial for murder, defendant can prove that his general reputation for peacefulness was good, by witnesses who knew defendant, and lived in the community in which he lived, although they never heard defendant's reputation in that respect discussed.—STATE v. SHAFER, Mont., 55 Pac. Rep. 526.

27. CRIMINAL LAW—Homicide — Self-defense.—An instruction that "the right to take life is limited to the apparent actual and present necessities then suddenly precipitated by the assailant, under such circumstances as then appear to the slayer, as a reasonable man, to place the life or person of the slayer in such peril as to admit of no other reasonable alternative than the killing of the assailant," is erroneous, in that it ignores the right of accused to act on what appeared to him at the time, as a reasonable man, necessary to save his own life, or prevent his receiving great bodily harm, although he was in no actual danger.—STATE v. ROLLA, Mont., 55 Pac. Rep. 523.

28. CRIMINAL LAW—Murder — Capital Punishment.—Rev. St. § 5339, declares that every person who commits murder in any place or district under the exclusive jurisdiction of the United States shall suffer death; and Act July 15, 1897, ch. 29, (29 Stat. 487), provides that, in all cases in which the accused is found guilty of murder under section 5339, the jury may qualify their verdict by adding thereto "without capital punishment" Held, that the latter provision authorized the jury to so limit their verdict in any case, without regard to the existence of mitigating circumstances, and that instructions confining the right to such cases were erroneous.—WINSTON v. UNITED STATES, U. S. S. C., 18 S. C. Rep. 212.

29. CRIMINAL LAW—Murder—Manslaughter.—A homicide is not manslaughter because defendant had shortly prior thereto become incapable of acting with deliberation and premeditation, by reason of injuries inflicted on him, unless they were caused by the unlawful act of deceased.—PEOPLE v. WORTHINGTON, Cal., 55 Pac. Rep. 396.

30. CRIMINAL LAW — Public Officers — Failure to Account for Public Funds.—An indictment against a municipal officer for failure to account to his successor for funds in his possession, which does not allege that accused's term of office had expired, or that his successor's term had begun, and which alleges that, on the day when the offense was committed, accused was such municipal officer, authorized by law to keep the funds with respect to which the prosecution is being had, does not charge an offense under Cr. Code, § 215, making municipal officers criminally liable for failure to account to their successors in office for trust funds in their possession.—DREYER v. PEOPLE, Ill., 52 N. E. Rep. 372.

31. CRIMINAL PRACTICE—Arraignment.—The affidavit of accused in support of a motion in arrest, that he had never been arraigned or pleaded to the indictment, cannot prevail over the record, which recites that on a certain date he was formerly arraigned, and pleaded not guilty, and announced himself ready for trial.—GILLESPIE v. PEOPLE, Ill., 52 N. E. Rep. 250.

32. DEEDS — Cancellation — Mental Incapacity.—A nephew, knowing the mental incapacity of his uncle, secured a conveyance of his land, in consideration, expressed in the deed, of supporting the grantor all his life, and giving his body a decent burial. After getting the conveyance, grantee neglected grantor, and had him sent to the insane asylum, to be cared for at public expense, and, selling the land, left the State. His grantees were implicated in the scheme of depriving the grantor of his land. Held, that the deeds should be canceled, as casting a cloud on the title to the heirs of the original grantor.—GOOD v. FLOYD, Tenn., 48 S. W. Rep. 687.

33. DEEDS — Cancellation — Attorney and Client.—A deed to the grantor's attorney, in trust for the benefit of the grantor and wife, is not constructively fraudulent by reason of the confidential relation, where the attorney acquires no advantage from the transaction.—DONAHOE v. CHICAGO CRICKET CLUB, Ill., 52 N. E. Rep. 351.

34. DEEDS—Notice.—A daughter who accepted deed in fee-simple from her mother is bound to take notice of the execution and existence of her father's recorded deed to an intermediary, through whom her mother derived title.—STAGER v. CRABTREE, Ill., 52 N. E. Rep. 378.

35. DESCENT AND DISTRIBUTION—Who are Kindred.—Hurd's St. 1897, p. 629, § 1, subd. 6, provides that "if any intestate leaves a widow or surviving husband and no kindred, his or her estate shall descend to such widow or surviving husband." Subdivision 3 provides that the real estate of one dying intestate without issue shall descend one-half to the surviving husband or wife, and the other half as provided elsewhere in said section. Held, that the surviving husband of a woman dying intestate, without issue, but leaving uncles and aunts, inherits one-half only of her real estate, as provided by subdivision 3, and not the whole thereof, as provided by subdivision 6.—LOCKWOOD v. MOFFETT, Ill., 52 N. E. Rep. 260.

36. DIVORCE—Payments to Divorced Wife.—Under our statute, when a divorce is granted to the husband for the fault of the wife the court has no power to make any allowance by way of support or maintenance for the wife; and when, in such a case, the plaintiff agreed that he would pay the defendant a certain sum per month, and that an order to that effect might be entered in the decree, and the same was accordingly done, the amount so ordered to be paid was not alimony, but arose from express contract, and payment could not be enforced by an attachment for contempt.—GLYNN v. GLYNN, N. Dak., 77 N. W. Rep. 594.

37. DRAINS—Acquiescence.—Adjoining owners constructing independent ditches, and then connecting them together, so as to form a continuous system of drainage, will be presumed to have acquiesced in the formation of such system, within 3 Starr & C. Ann. St. p. 475, § 3, providing that none of the parties shall fill up a drain, where their consent to the construction thereof might be inferred from their acquiescence.—RIBORDY v. MURRAY, Ill., 52 N. E. Rep. 325.

38. ELECTIONS—Qualifications of Voters—Citizenship.—Rev. St. U. S. tit. 25, § 1994, providing that any woman married to a citizen, and who might herself be naturalized, shall be deemed a citizen, is a uniform rule, within Const. U. S. art. 1, § 8, conferring upon congress the power to establish a uniform rule of naturalization, even though congress has provided for the naturalization of aliens, both male and female, by a judicial proceeding.—DORSEY v. BRIGHAM, Ill., 52 N. E. Rep. 303.

39. EMINENT DOMAIN—Damages—Evidence.—If a witness resides near land sought to be condemned for a railroad, and owns land adjoining it, his opinion as to whether the railroad will benefit or injure the land is admissible on the question of the owner's damage.—SEWELL v. CHICAGO TERMINAL TRANSFER R. CO., Ill., 52 N. E. Rep. 302.

40. ESTOPPEL—Mortgage.—One who buys land at an execution sale, where an apparently valid mortgage has been deducted, as a prior incumbrance, for the purpose of appraisal, is thereby estopped from denying the validity of such mortgage.—ARLINGTON MILL & ELEVATOR CO. v. YATES, Neb., 77 N. W. Rep. 677.

41. EVIDENCE—Bastards.—On the issue of the legitimacy of a child of slave parents, evidence that the father at one time was permitted by his master to take another wife, but afterwards returned to the mother, and lived with her as man and wife, was properly excluded; the child not having been begotten during the time that the father was living with the other woman.—ERWIN v. BAILEY, N. Car., 31 S. E. Rep. 844.

42. EVIDENCE—Negligence—Habitual Drunkard.—In an action against a railroad for injury, predicated on a conductor's incompetency, evidence that he was a drinking man was inadmissible, there being no proof that he was drunk at the time of the accident; and this though a rule of the company strictly forbade drinking.—GALVESTON, H. & S. A. RY. CO. v. DAVIS, Tex., 48 S. W. Rep. 570.

43. EVIDENCE—Negligence—Injury.—In an action by an engineer for injury resulting from a collision, the company showed that he disregarded signals which would have prevented the accident, and he showed he was then engaged in other duties. Held, that evidence that the engineer slept at his post, and frequently ran by stations where he should have stopped, was properly excluded.—MISSOURI, K. & T. RY. CO. v. JOHNSON, Tex., 48 S. W. Rep. 568.

44. EVIDENCE—Parol Evidence.—Oral evidence is inadmissible to show that from a sale of a photograph gallery by bill of sale transferring all the material and working apparatus and all cameras and negatives in the gallery, the parties orally reserved a lens and camera, and a stated number of negatives located therein.—HODSON v. VARNEY, Cal., 55 Pac. Rep. 413.

45. EXECUTION — Judgment.—Under Comp. Laws, § 5114, providing that execution "may be issued to the sheriff of the county where the judgment is docketed," an execution issued to a county other than that in which the judgment was rendered is valid, though taken from the clerk's office before the judgment is docketed in the former county, docketing occurring before the execution was delivered to the sheriff.—MCDONALD v. FULLER, S. Dak., 77 N. W. Rep. 581.

46. FEDERAL COURTS—Decision of State Court—Judgment.—Where the statute of a State permits the amendment of a petition when a demurrer thereto has been sustained, the judgment of the supreme court of the State reversing the decision of the lower court overruling such a demurrer, and directing that it be sustained, is not a final judgment reviewable by the supreme court on writ of error.—CLARK v. CITY OF KANSAS CITY, KAN., U. S. S. C., 19 S. C. Rep. 207.

47. FEDERAL COURTS — Federal Question—Constitutional Law.—An answer in a suit in a State court to foreclose a lien created by a re-assessment, alleging that the notice of re assessment was insufficient, and that by reason thereof defendant's property was sought to be taken without due process of law, and in conflict with the terms of the fourteenth amendment, raises a federal question, so as to give the supreme court jurisdiction.—BELLINGHAM BAY & B. C. R. CO. v. CITY OF NEW WHATCOM, U. S. S. C., 19 S. C. Rep. 205.

48. FEDERAL COURTS — Federal Question in State Court.—The United States Supreme Court will not review the judgment of a State court on the ground of a denial by the latter court of a right under a statute of the United States, unless the record shows, either by words used or by clear and necessary intendment therefrom, that the right was specifically claimed, or a definite issue as to the possession of the right is distinctly deducible from the record, without an adverse decision of which the judgment could not have been rendered.—CAPITAL NAT. BANK OF LINCOLN, NEB., v. FIRST NAT. BANK OF CADIZ, OHIO, U. S. S. C., 19 S. C. Rep. 202.

49. FEDERAL OFFENSE—Embezzling Mail Matter.—Where defendant, charged with embezzling marked currency from a decoy letter, stated it was placed in the pocket of his coat while he was absent, by enemies in the post-office, the government is not bound by his statement on cross-examination naming two co-employees as enemies; and evidence that the persons named were friendly to defendant is not objectionable as collateral, but is competent in rebuttal.—SCOTT v. UNITED STATES, U. S. S. C., 19 S. C. Rep. 209.

50. FRAUDULENT CONVEYANCES — Insolvents—Preference of Creditors.—A failing debtor may prefer a creditor if he does so in good faith, though the creditor is a member of his family.—SCHUBERTH v. SCHILLO, Ill., 52 N. E. Rep. 319.

51. FRAUDULENT CONVEYANCES—Wife's Separate Estate.—Where a husband appropriates his wife's separate property by purchasing land in his own name, and she allows the title to remain in his name till he sells the property, six years thereafter, she loses any right to the proceeds as her separate estate, there having been no promise at the time of the investment that title should be taken for her, though she supposed it would be so taken.—ROSENBAUM v. DAVIS, Tenn., 48 S. W. Rep. 706.

52. FRAUDULENT REPRESENTATIONS — Evidence.—Where parties are induced to part with their property through misrepresentation and fraud, the ones who perpetrated said frauds are responsible to the party injured for the damages thereby sustained.—BURNHAM v. LUTZ, Kan., 55 Pac. Rep. 519.

53. GIFT CAUSA MORTIS—Delivery.—The alleged donee of a gift *causa mortis* was a student in the office of the donor, resided with the latter, and each had a key to the office. The donor, at the residence, stated to the donee that he gave the donee all the office furniture, but did no further act to deliver the same. Held, it is not enough that the donee had a previous and continuous possession of the gift. There must be a delivery at the time of the donation. In this case there was no visible change of possession, by symbol or otherwise, at the time of the alleged delivery, which consisted wholly of words, and there was no valid gift *causa mortis*.—ALLEN v. ALLEN, Minn., 77 N. W. Rep. 567.

54. GUARANTY — Consideration — Notes.—The stockholders of a corporation executed to a bank a bond which recited that the obligors were interested in the company, and that for its success it needed to borrow money, and that the secretary was authorized to negotiate paper to a certain amount during the ensuing 12 months, and the obligors would become security therefor. Held to amount to a continuing guaranty, which could not be terminated by the obligors within the year, and hence was not affected by the death of one obligor within that time.—HOME SAV. BANK v. HOSIE, Mich., 77 N. W. Rep. 625.

55. HIGHWAY—Obstruction.—In a prosecution for obstructing a public highway, evidence showing a continuous and undisputed public use of the way for over 20 years is sufficient to show that it is a public high-

way, though there is no evidence of a dedication.—CROMER v. STATE, Ind., 52 N. E. Rep. 239.

56. HOMESTEAD—Improvements—Liability for Loan.—Money borrowed for the purpose of erecting a residence, and so used, constitutes an obligation contracted for the erection of improvements, under section 9 of article 15 of the constitution of the State.—BECKENHEUSER v. FERRELL, Kan., 55 Pac. Rep. 499.

57. INSOLVENT TRUSTEE—Preference of Beneficiary.—The owner of trust property is not, merely by reason of the character of his claim, entitled to a preference over the general creditors of an insolvent trustee.—MORRISON v. LINCOLN SAVINGS BANK & SAFE DEPOSIT CO., Neb., 77 N. W. Rep. 655.

58. INSURANCE—Mortgage Clause.—Where a policy of insurance contains a mortgage clause providing that the loss, if any, is payable to the mortgagee as its interest may appear, and other provisions constituting a separate contract of insurance of the mortgagee's interest, and by the provisions of the policy any action for loss thereunder must be brought within six months after the loss occurs, and the mortgagee fails to bring any action thereon within the time so limited, and is barred thereby, such bar is not effectual against an action by the mortgagor brought within the time so limited by the contract.—SHAWNEE FIRE INS. CO. v. BAYHA, Kan., 55 Pac. Rep. 474.

59. INSURANCE—Use of Insured Property.—A policy of insurance on a harvester "while in use in Tulare county" does not cover a loss occurring while it is stored in a shed, and is not being actually used for harvesting purposes.—SLINKARD v. MANCHESTER FIRE ASSUR. CO., Cal., 55 Pac. Rep. 417.

60. INSURANCE—Waiver of Conditions.—An insurance policy provided that if, with the knowledge of insured, foreclosure of any mortgage against the property be commenced, the policy should be void, unless otherwise provided by agreement indorsed thereon. The insurance was payable in part to a mortgagee, who subsequently notified an agent of the company of his intention to foreclose; and the latter advised that it was all right to proceed with the foreclosure without permission being indorsed on the policy. Held a waiver of the condition.—CRONIN v. FIRE ASSN. OF PHILADELPHIA, Mich., 77 N. W. Rep. 648.

61. INTOXICATING LIQUORS—Illegal Sale.—In a prosecution for an illegal sale of beer, it is not necessary for the jury to determine whether the liquor sold was intoxicating, in addition to finding that it was beer, since beer, which is judicially known to be a malt liquor, is an intoxicating liquor, under Horner's Rev. St. 1897, § 5313 (Burns' Rev. St. 1894, § 7277), providing that the words "intoxicating liquor" shall apply to any malt liquor.—DOUGLAS v. STATE, Ind., 52 N. E. Rep. 238.

62. JUDGMENTS — Conclusiveness—Fraud.—Property was sold under execution, and a judgment lienor redeemed, and demanded a sheriff's deed. A junior judgment lienor redeemed afterwards, but before the deed was demanded, and paid the sheriff an amount sufficient to redeem from the prior judgment. Held that, as the prior lienor acquired the title of the purchaser under the execution sale, he had such an interest beyond the right of redemption as he was entitled to protect by showing that the subsequent judgment, though regular on its face, was void.—BENNETT v. WILSON, Cal., 55 Pac. Rep. 390.

63. JUDGMENT LIENS.—One purchasing land with knowledge that a judgment debtor is the real owner of it takes it subject to the lien of the judgment, though the record title was in a trustee when the judgment was rendered, and the sale was not made to defraud creditors.—ARMSTRONG v. ELLIOTT, Tex., 48 S. W. Rep. 605.

64. LIFE INSURANCE—Statements by Medical Examiner.—The medical examiner of a mutual benefit society is the agent of the society, notwithstanding conditions to the contrary in the application and certificate; and where he fails to insert the answers to questions in the application as given by the assured his act is the society's, and not the assured's.—ROYAL NEIGHBORS OF AMERICA v. BOMAN, Ill., 52 N. E. Rep. 264.

65. MANDAMUS—Public Schools — Reinstatement of Pupil.—An action of *mandamus* will lie and may be maintained to reinstate a pupil in school, if the action of the officer or officers by which the party was refused admission to or continuance in the school was an arbitrary or capricious exercise of authority.—JACKSON v. STATE, Neb., 77 N. W. Rep. 662.

66. MARRIAGE—Presumptions—Validity.—Where there is evidence that a marriage was performed in a foreign country, the presumption that the necessary preliminary steps were taken will not prevail if there is proof as to what those steps are, and that compliance with them is essential, and there is no evidence of such compliance.—CANALE v. PEOPLE, Ill., 52 N. E. Rep. 310.

67. MASTER AND SERVANT—Defective Appliances—Assumption of Risk.—A servant's implied assumption of risks does not extend to more hazardous work outside of his contract of hiring, and where he is required to do the more hazardous work, and is injured while using defective tools furnished by the master, he will be entitled to recover, although the defects were such that an experienced person would have discovered them by using care.—INDIANA NATURAL & ILLUMINATING GAS CO. v. MARSHALL, Ind., 52 N. E. Rep. 232.

68. MASTER AND SERVANT—Injury to Employee—Contributory Negligence.—Where, on a special occasion, a master agreed to look after the roof of the mine in which his servant was working, and the evidence shows that the servant was busy, with no time to look after the roof, and does not show that his attention was drawn to the fact that the duty of inspection was being neglected, he cannot be said to be guilty of contributory negligence when injured by falling rocks.—WESTVILLE COAL CO. v. SCHWARTZ, Ill., 52 N. E. Rep. 276.

69. MASTER AND SERVANT—Injuries to Servant—Obvious Defect.—Where defendant's servant, while coupling cars, was injured by catching his foot under the rail, defendant was not relieved of liability by the fact that its system of ballast, which left an open space under the rail, was a system in general use by other roads, unless the system rendered the track reasonably safe for employees.—LAKE ERIE & W. R. CO. v. MORRISSEY, Ill., 52 N. E. Rep. 299.

70. MINING—Citizenship.—Citizenship of one, and his rights to a mining claim dependent thereon, cannot be questioned in an action between him and other individuals to determine adverse claims to mining property.—MCCARTHY v. SPEED, S. Dak., 77 N. W. Rep. 590.

71. MORTGAGES—Assignment — Implied Warranty.—An assignment of a mortgage carries with it an implied warranty of the genuineness of the mortgage.—WALLER v. STAPLES, Iowa, 77 N. W. Rep. 570.

72. MORTGAGES — Assumption — Consideration.—One who accepts a conveyance of land, and, as part of the consideration, agrees to pay an existing incumbrance thereon, is bound not only to the promisee, but to the incumbrancer, to do so, and estopped from denying the validity of such incumbrance.—GOOS v. GOOS, Neb., 77 N. W. Rep. 687.

73. MORTGAGES—Default in Installments.—A bond and mortgage given to secure payment of the debt stated in the former instrument provided for an election by the creditor to declare the entire debt due, and for enforcement by foreclosure, if default was made in payments of interest, or an installment or installments of principal, as they respectively matured. Acceptance of interest due did not waive the default in payment of matured installments of principal.—NORTHWESTERN MUT. LIFE INS. CO. v. BUTLER, Neb., 77 N. W. Rep. 667.

74. MORTGAGES—Enforcement—Pledge.—Where one executes a promissory note, and transfers to the payee, as collateral security thereto, a note then held against a third person secured by a real estate mortgage, a decree foreclosing such mortgage will not bar an action

at law on the first note, since it did not evidence the debt the mortgage was previously given to secure.—MAXWELL v. HOME FIRE INS. CO., Neb., 77 N. W. Rep. 581.

75. MUNICIPAL CORPORATIONS—Bonds for Location of County Seat.—A municipality receives such special benefits from the location of the county seat within its limits as authorize the imposition on such municipality of the entire cost of procuring such location, and of the necessary public buildings.—SCHNECK v. CITY OF JEFFERSONVILLE, Ind., 52 N. E. Rep. 212.

76. MUNICIPAL CORPORATIONS—Contracts for Pavements.—A provision in a contract for paving a street, requiring the contractor to keep the pavement in repair for a term of five years after its completion, and requiring him to give a bond to secure the performance thereof, renders the assessment against the abutting lot owners to pay for the cost of such improvement and repair illegal and void.—CITY OF KANSAS CITY v. HANSON, Kan., 55 Pac. Rep. 513.

77. MUNICIPAL CORPORATIONS—Injury to Traveler—Contributory Negligence.—Where a person, knowing of an obstruction in the street, its location and relation to the street and sidewalk, attempts to pass it in the dark, without taking any precaution to avoid it other than by "feeling with his feet and searching with his eyes," he is guilty of contributory negligence which will bar recovery for any injury he may receive.—ROGERS v. CITY OF BLOOMINGTON, Ind., 52 N. E. Rep. 242.

78. MUNICIPAL CORPORATIONS—Liability for Torts.—Distinction stated between actions arising on contracts made by a municipal corporation in excess of its corporate powers and actions against corporations for injuries caused by the tortious acts done by its officers and agents in the course of its business, and of their employment in excess of its powers.—SACKS v. CITY OF MINNEAPOLIS, Minn., 77 N. W. Rep. 563.

79. OFFICERS—Suspension—Constitutional Grounds.—Under Const. art. 4, § 22, providing that whenever any officer, who has the custody of public or trust funds, is probably guilty of embezzlement thereof, the governor shall direct his prosecution, and, on true bill found, shall suspend him and appoint a successor, the governor has no power to appoint a successor to an officer indicted for forgery.—MCMILLAN v. BULLOCK, S. Car., 31 S. E. Rep. 860.

80. PHYSICIANS—License—Burden.—In a prosecution for illegally practicing medicine, the burden is on accused to show that he had a license to practice as required by law, since it is a matter peculiarly within his own knowledge.—PEOPLE v. BOO DOO HONG, Cal., 55 Pac. Rep. 402.

81. PRINCIPAL AND AGENT—Authority of Agent.—A contract for the sale of cattle provided that they were to be delivered and weighed at a certain place. The person who delivered them for the seller had a note authorizing him to represent the seller in weighing the cattle. Held not to authorize the bearer to consent to their being shipped to another town, and there weighed, without food or water.—MANN v. DUBLIN COTTON OIL CO., Tex., 48 S. W. Rep. 567.

82. QUIETING TITLE — Pleading — Answer.—Where plaintiff makes an alleged ownership in land his sole basis of action to quiet title, an answer is not demurrable where it makes a specific denial of such ownership, with positive, affirmative averments showing fee-simple title in defendant, though it does not recite all the evidence by which such defense is to be established.—MALE v. BROWN, S. Dak., 77 N. W. Rep. 585.

83. RAILROAD COMPANY—Duty to Operate.—Inasmuch as a railroad company is bound to carry both passengers and freight, and the duties and liabilities of a railroad company to passengers riding on freight and passenger trains are very different, a railroad company is obliged to furnish and operate passenger trains separate from its freight trains for the accommodation of passengers. By the running of a mixed train, consisting of freight, coal, stock, and passenger cars, a railroad company does not discharge its duty to the public of furnishing transportation to passengers.—PEOPLE v. ST. LOUIS, ETC. R. CO., Ill., 52 N. E. Rep. 292.

84. RECEIVERS—Judgment—Execution.—Property in the hands of a receiver cannot be sold under execution without leave of court.—PELLETIER v. GREENVILLE LUMBER CO., N. Car., 31 S. E. Rep. 855.

85. RECEIVERS — Rents — Distribution.—Rents collected by a receiver appointed to protect the interests of those concerned in the property, in an action by a judgment creditor against a mortgagee of the property to set aside the mortgage, should be first applied in payment of the mortgage, where it is sustained as a prior lien to that of the creditor, though the appointment was made on his motion.—CROSS v. WILL COUNTY NAT. BANK, Ill., 52 N. E. Rep. 322.

86. REPLEVIN — Chattel Mortgage.—A third person claiming property against which a prior chattel mortgage is being foreclosed by one owning only part of the debt cannot complain of the failure to join the owner of the other part beyond insisting that he shall not be taxed with costs in two suits, since the failure to join such part owner does not make the action void. AVERY v. POPPER, Tex., 48 S. W. Rep. 572.

87. SALE — Conditional Sale — Replevin—Demand.—Where goods have been sold under a contract reserving title in the vendor as security for the purchase money, which is payable in installments, where the vendee has paid a large part of the purchase money, and where the vendor has accepted payments after the time the whole became due, the vendor cannot retake the property without a previous demand for the unpaid money.—PEOPLE'S FURNITURE & CARPET CO. v. CROSBY, Neb., 77 N. W. Rep. 658.

88. SALE—Creditors.—Under a contract of sale providing that title to the property shall remain in the seller till delivery of the property to the purchaser, and execution by the latter of notes and mortgage to secure the price, though title is not reserved to secure the purchase price, the provision for giving the notes and mortgage not having been performed before creditors of the buyer levy on it, and the seller claims it, the seller is entitled thereto against such creditors, though the notes and mortgage are thereafter executed.—MECHANICS' BANK OF ST. LOUIS, MO., v. GULLETT GIN CO., Tex., 48 S. W. Rep. 627.

89. SET-OFF — Equitable Set-off — Damages.—Where the owner of certain mines leased them to a corporation, and at the same time, as a part of the same transaction, sold and conveyed to the agent of the corporation both real and personal property used in connection with the mines, conveying both by the same deed, containing covenants of general warranty and of seisin, the grantor having knowledge that the purchase was made for the corporation, and that it paid the purchase money, but the agent taking the title to himself for purposes of his own, and afterwards conveying to the corporation, such corporation is entitled to the benefits of the covenants both as to the real and personal property, and may set off in equity, as against a judgment recovered against it for rental of the mines, damages accruing from a breach of the warranty by reason of a failure of its title through a prior mortgage given by the grantor.—CENTRAL APPALACHIAN CO. v. BUCHANAN, U. S. C. C. of App., Sixth Circuit, 90 Fed. Rep. 454.

90. TRIAL—Jurors — Talesmen.—Where, on failure to obtain a jury from the regular jurors, and those then present and called as talesmen, the court ordered the sheriff to summon 50 freeholders, residents of the county, to attend next day, and adjourned till the next morning, persons then called to the jury box cannot be objected to because they were not bystanders the day before, and were present then only by reason of the summons under said order, or because said order directed the summoning only of freeholders.—STATE v. MCDOWELL, N. Car., 31 S. E. Rep. 859.

91. TRIAL—Personal Injuries — Examination.—Where plaintiff, in an action for personal injuries, has exhibited her legs in the presence of the court, and physicians who have examined them have testified for her that she would not be able to wear artificial legs, defendant is entitled to have an examination by experts of its own selection, for the purpose of testifying on said point, though they are in its regular employment as surgeons.—CHICAGO, ETC. RY. CO. v. LANGSTON, Tex., 48 S. W. Rep. 610.

92. TRUSTS—Powers of Attorney—Agents.—Intestate, by an instrument in writing, appointed defendant as his agent and attorney in fact, with full power to prosecute, in the name of the intestate, a suit already commenced against S for a tract of land, and authorized him to have the deed to the same made to himself, to sell the land, and from the proceeds to maintain the intestate and his wife for their lives, or for the life of the survivor, and to pay the balance, if any, to the intestate's children, after deducting for his own trouble and expenses. Defendant elected to take the proceeds of the sale of the land involved in the suit with S instead of taking title in himself. Held, that the instrument created an express trust, and not a mere agency, so that, after the death of the intestate, the proceeds of the sale must be applied to the widow's support instead of going to his administrator.—RAMSEY v. RAMSEY, N. Car., 31 S. E. Rep. 835.

93. VENDOR AND PURCHASER — Contract.—A contract for the sale of realty provided that, to enable the vendee to extend a mortgage on the land, the title should be in the vendee; that the vendor agreed to the extension, and authorized the vendee to make it. Held, that the vendee could either extend the existing mortgage, or make a new loan upon the land and pay the mortgage from the proceeds.—WATT v. HUNTER, Tex., 48 S. W. Rep. 593.

94. VENDOR AND PURCHASER - Fraudulent Representations.—A representation by the vendor of lands that they do not overflow is not false or fraudulent simply because such lands are overflowed at times by exceptional floods, where that fact is a matter of common notoriety.—KERNS v. PERRY, Tenn., 48 S. W. Rep. 729.

95. WILLS—Construction.—A will gave certain specific bequests, and gave testator's widow, in lieu of dower or other statutory provision, certain property in fee, and a stated annuity. It created another annuity to commence on his widow's death, and directed the sale of non income bringing property, and prohibited, during the widow's life, the sale of property bringing income. The possession and profits of certain income bringing property disposed of by the will were withheld from the devisees until after the widow's death. The widow renounced the will, and elected to take under the statute as a surviving widow. Held, that the residuary legatees were entitled to a distribution immediately on the widow's election, since it accelerated the residuum.—SLOCUM v. HAGAMAN, Ill., 52 N. E. Rep. 382.

96. WILLS—Contest by Testator's Widow.—Testator's widow, whose share, by provision of Code 1873, § 2452, cannot be affected by her husband's will, unless she consents thereto, has no interest authorizing her to contest his will, though property given her child is with remainder to others in case of death of the child before attaining majority, and though the executor is given the management of the property devised to the child, and though, under section 2354, in the absence of an executor the widow would have the first right to act as administrator.—IN RE FALLON'S WILL, Iowa, 77 N. W. Rep. 575.

97. WILLS—Creation of Trust.—Land was devised by a testatrix, in trust, during the lives of two specified persons, to receive and apply the rents in equal shares to the use of six of her children, and, upon the termination of the trust, to sell the property, and divide the proceeds "equally among all my said six children, then living, and the descendants of such as may then be dead." If there were no descendant of a deceased child, its share was to be equally distributed among her children then living. One of these children died before the testatrix. Held, that there was no partial intestacy, as, upon the termination of the trust, the share of the deceased child would pass with the other shares to those who should then be entitled under the ultimate devise of the will.—SMITH v. SECOR, N. Y., 52 N. E. Rep. 179.

98. WILL—Devise—To Widow.—A devise to testator's widow of real estate, including the homestead and other lands, for life or during widowhood, together with the sole use and control thereof, and all rents and issues arising therefrom, is inconsistent with the right to homestead, requiring her to elect between the two; and, having accepted the provisions of the will, she cannot, after marrying, hold the homestead, or any of the lands devised her.—HELM v. LEGGETT, Ark., 48 S. W. Rep. 675.

99. WILLS — Election by Widow.—Where testator, in his will, gives his widow and others specific real and personal property, and provides that the residue of his estate shall be equally divided between her and his grandchildren, and does not provide that such provisions for her benefit are in lieu of any of her statutory rights, she may accept the provisions of the will, and still be entitled to the $500 of personalty, or, in lieu of personalty, cash, allowed the widow, by Horner's Rev. St. 1897, § 2269, out of the husband's estate.—WHISNAND v. FEE, Ind., 52 N. E. Rep. 229.

100. WILLS—Instructions—Attestation.—A contestant of a will on the ground of undue influence cannot object to a failure to instruct that the draftsman of the will, who was an executor and a beneficiary, and who had been testator's attorney, had the burden of showing that he exercised no undue influence, where contestant made no request for such an instruction.—DRURY v. CONNELL, Ill., 52 N. E. Rep. 368.

101. WILLS—Nature of Estate Created.—A will devising testator's estate without words of limitation, and subject to a personal charge, to be held and enjoyed by the devisees indefinitely, unless they desire to terminate their interest, which they could do by a written instrument signed by at least two of them, passes an estate in fee, determinable only in the manner prescribed.—MCFARLAND v. MCFARLAND, Ill., 52 N. E. Rep. 281.

102. WILLS — Probate — Collateral Attack.—Under Code, § 2149, requiring the clerk of the superior court to take the proofs and examination of the witnesses touching the execution of a will, and embody the same in his certificate of probate and record it with the will, and section 2150 declaring such record and probate conclusive of the validity of the will till it is vacated on appeal or declared void by a competent tribunal, the probate by the clerk is a judicial act, and cannot be vacated in a collateral proceeding on the ground that the handwriting of testator was proved by only one of the witnesses to the will.—MCCLURE v. SPIVEY, N. Car., 31 S. E. Rep. 857.

103. WILL — Testamentary Trusts.—Under a will giving trustees power to manage the estate, and to sell the property, and to reinvest it, during the life estate of testator's wife, and directing a distribution among the remainder-men at her death, the trustees have no power to incorporate the estate, without the consent of the remainder-men, and to require them to accept stock in lieu of the property, thereby depriving them of the power to control the property after the death of the life tenant, though the trustees act in good faith to save the expense and sacrifice to the property that would be occasioned by a suit in partition.—GARESCHE v. LEVERING INV. CO., Mo., 48 S. W. Rep. 653.

104. WITNESS — Incriminating Testimony — Election Contest.—While a person who has voted illegally at an election cannot be compelled to testify in a contest, yet he may waive his privilege, and, if he neither claimed exemption, nor refused to testify, his evidence should be received.—EGGERS v. FOX, Ill., 52 N. E. Rep. 269.